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REPORT AND RECOMMENDATIONS MADE BY THE PANEL OF COMMISSIONERS CONCERNING THE TENTH INSTALMENT OF "E3" CLAIMS

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Introduction

1. The Governing Council of the United Nations Compensation Commission (the "Commission") appointed the present Panel of Commissioners (the "Panel"), composed of Messrs. John Tackaberry (Chairman), Pierre Genton and Vinayak Pradhan, at its twenty-eighth session in June 1998, to review construction and engineering claims filed with the Commission on behalf of corporations and other legal entities in accordance with the relevant Security Council resolutions, the Provisional Rules for Claims Procedure (S/AC.26/1992/10) (the "Rules") and other Governing Council decisions. This report contains the recommendations to the Governing Council by the Panel, pursuant to article 38(e) of the Rules, concerning seventeen claims included in the tenth instalment. Each of the claimants seeks compensation for loss, damage or injury allegedly arising out of Iraq's 2 August 1990 invasion and subsequent occupation of Kuwait.

2. Based on its review of the claims presented to it to date and the findings of other panels of Commissioners contained in their reports and recommendations, this Panel has set out some general propositions concerning construction and engineering claims filed on behalf of corporations (the "'E3' Claims"). The general propositions are contained in Annex I entitled "Summary of General Propositions" (the "Summary"). The Summary forms part of, and is intended to be read together with, this report.

3. Each of the claimants included in the tenth instalment had the opportunity to provide the Panel with information and documentation concerning the claims. The Panel has considered evidence from the claimants and the responses of Governments to the reports of the Executive Secretary issued pursuant to article 16 of the Rules. The Panel has retained consultants with expertise in valuation and in construction and engineering. The Panel has taken note of certain findings by other panels of Commissioners, approved by the Governing Council, regarding the interpretation of relevant Security Council resolutions and Governing Council decisions. The Panel was mindful of its function to provide an element of due process in the review of claims filed with the Commission. Finally, the Panel has further amplified both procedural and substantive aspects of the process of formulating recommendations in the Summary to its consideration of the individual claims.

I. PROCEDURAL HISTORY

A. The procedural history of the claims in the tenth instalment

4. A summary of the procedural history of the "E3" Claims is set down in paragraphs 10 to 18 of the Summary.

5. On 8 September 1999, the Panel issued a procedural order relating to the claims included in the tenth instalment. In view of:

(a) the apparent complexity of the issues raised;

(b) the volume of the documentation underlying the claims; and/or

(c) the amount of compensation sought by the claimants,

the Panel decided to classify each of the claims as "unusually large or complex" within the meaning of article 38(d) of the Rules. In accordance with that Rule, the Panel decided to complete its review of the claims within 12 months of the date of its procedural order.

6. In view of the review period and the available information and documentation, the Panel determined that it was able to evaluate the claims without additional information or documents from the Government of Iraq. Nonetheless, due process, the provision of which is the responsibility of the Panel, has been achieved by the insistence of the Panel on the observance by claimants of the article 35(3) requirement for sufficient documentary and other appropriate evidence.

7 In drafting this report, the Panel has not included specific citations from restricted or non-public documents that were produced or made available to it for the completion of its work.

B. The claimants

8. This report contains the Panel's findings with respect to the following claims for losses allegedly caused by Iraq's invasion and occupation of Kuwait:

(a) the Consortium constituted by Abay Engineering S.A., a corporation existing under the laws of Belgium, and Spie Batignolles, a corporation existing under the laws of France, which seeks compensation in the total amount of 12,168,700 United States dollars (USD);

(b) Sissa Construction and Management Corporation, a corporation organised under the laws of Canada, which seeks compensation in the total amount of USD 159,718,942;

(c) Alexandria Shipyard Company, a corporation organised under the laws of Egypt, which seeks compensation in the total amount of USD 15,356,626;

(d) Misr Concrete Development Company, a corporation organised under the laws of Egypt, which seeks compensation in the total amount of USD 24,864,614;

(e) Technip S.A., a corporation organised under the laws of France, which seeks compensation in the total amount of USD 44,542,630;

(f) Enterprise Muller Freres - Travaux Publics S.A., a corporation organised under the laws of France, which seeks compensation in the total amount of USD 1,552,629;

(g) ABB Schaltanlagen GmbH, a corporation organised under the laws of Germany, which seeks compensation in the total amount of USD 16,635,422;

(h) Irbid District Electricity Company, a corporation organised under the laws of Jordan, which seeks compensation in the total amount of USD 1,444,824;

(i) Jordan Electric Power Company, a corporation organised under the laws of Jordan, which seeks compensation in the total amount of USD 2,363,213;

(j) The Jordanian Electrical and Mechanical Engineering Company, a corporation organised under the laws of Jordan, which seeks compensation in the total amount of USD 228,670;

(k) Atlantic Gulf and Pacific Company of Manila, Inc., a corporation organised under the laws of the Philippines, which seeks compensation in the total amount of USD 288,817;

(l) Polimex-Cekop Limited, a corporation organised under the laws of Poland, which seeks compensation in the total amount of USD 51,683,454;

(m) Bechtel Limited, a corporation organised under the laws of the United Kingdom of Great Britain and Northern Ireland, which seeks compensation in the total amount of USD 10,013,427;

(n) Davy McKee (London) Limited, a corporation organised under the laws of the United Kingdom of Great Britain and Northern Ireland, which seeks compensation in the total amount of USD 3,047,678;

(o) ABB Lummus Crest Inc., a corporation organised under the laws of the United States of America, which seeks compensation in the total amount of USD 30,230,415;

(p) John Brown, a division of Trafalgar House, Inc., a corporation organised under the laws of the United States of America, which seeks compensation in the total amount of USD 10,065,777; and

(q) Overseas Bechtel, Inc., a corporation organised under the laws of the United States of America, which seeks compensation in the total amount of USD 4,915,980.

9. These amounts claimed in United States dollars represent the alleged loss amounts after correction for applicable exchange rates as described in paragraphs 55 to 57 of the Summary.

II. THE CLAIM OF THE CONSORTIUM CONSTITUTED BY ABAY ENGINEERING S.A. AND SPIE BATIGNOLLES

10. The Consortium constituted by Abay Engineering S.A., a corporation existing under Belgian law, and Spie Batignolles, a corporation existing under French law, (the "Consortium") entered into an agreement on 15 February, 1989 with ARADET, "a panarab company with headquarters in Iraq". The agreement (the "STTP contract") provided for the construction in Al-Qaim, Iraq of a plant for the production of sodium tripolphosphate.

11. The Consortium asserts that work under the STTP contract came to a complete standstill in November 1990, as a result of Iraq's invasion and occupation of Kuwait.

12. The Consortium seeks compensation in the total amount of USD 12,168,700 for contract losses, loss of profits, loss of tangible property, and "mitigation expenses".

A. Contract losses

1. Facts and contentions

13. The Consortium seeks compensation in the amount of USD 1,142,467 for "unpaid engineering services" provided in connection with the STTP contract.

14. The STTP contract came into effect on 22 May 1989. The total contract value was 115,365,000 Deutsche Mark (DEM) plus 1,176,000 Iraqi dinars (IQD). The amount payable by ARADET under the STTP contract was guaranteed by APICORP, a company created under the auspices of the Organisation for Arab Petroleum Exporting Companies, up to an amount of DEM 130,000,000. The "Complete and Ready for Commissioning Certificate" was due to be issued by August 1991, and the "Taking Over Certificate" was due to be issued by December 1991.

15. The Consortium asserts that, by November 1990, work on the STTP contract had come to a "complete standstill". The Consortium's employees were evacuated from Iraq from September 1990 to January 1991.

16. According to the fully motivated award dated 25 September 1997 of the tribunal appointed by the International Court of Arbitration of the International Chamber of Commerce ("ICC"), negotiations continued through 1991 and into 1992 in an attempt to re-negotiate the contract to meet the changed circumstances. The attempt to re-negotiate the contract failed in May 1992, when APICORP's board of directors refused to approve the new arrangements. In the course of the negotiations, the Consortium took the opportunity to set out in full its losses on the project.

17. On 1 September 1992, the Consortium requested APICORP to pay, under the guarantee, the amounts due by ARADET under clause 44 of the STTP

Contract. APICORP refused to do so and on 22 November 1993 the Consortium initiated arbitration proceedings against APICORP at the International Court of Arbitration of the ICC.

18. In its claim, the Consortium put forward all its losses on the project. In the event, the tribunal appointed by the International Court of Arbitration of the ICC held that the contract had been frustrated on 31 May 1992, and the Consortium succeeded in recovering payment under sub-clauses 44.1 and 43.3 of the STTP contract.

19. Sub-clause 44.1 reads as follows:

"Frustration:

In the event of the Contract being frustrated the sum payable by the Employer to the Contractor in respect of the work executed shall be the same as that which would have been payable under Clause 43 (Outbreak of War and Termination) hereof if the Contract had been terminated under the provisions of Clause 43 hereof."

20. Sub-clause 43.3 reads as follows:

"Payment if Contract terminated:

If the Contract shall be terminated as aforesaid the Contractor shall be paid by the Employer (in so far as such amounts or items shall not have already been covered by payments on accounts made to the Contractor) for all work executed prior to the date of termination at the rates and prices provided in the Contract and in addition:

(a) The amount payable in respect of any preliminary items, so far as the work or service comprised therein has been carried out or performed, and a proper proportion as certified by the Engineer of any such items the work or service comprised in which has been partially carried out or performed.

(b) The cost of materials or goods reasonably ordered for the Works or for use in connection with the Works which shall have been delivered to the Contractor or of which the Contractor is legally liable to accept delivery (such materials or goods becoming the property of the Employer upon such payment being made by him).

(c) A sum, to be certified by the Engineer, being the amount of any expenditure reasonably incurred by the Contractor in the expectation of completing the whole of the Works, in so far as such expenditure shall not have been covered by the payments in this Sub-Clause before mentioned.

(d) The reasonable cost of removal under Sub-Clause 2 of this Clause and (if required by the Contractor) return thereof to the

Contractor's Works in his country of registration or to any other destination at no greater cost.

(e) The reasonable cost of repatriation of all the Contractor's staff and workmen employed on or in connection with the Works at the time of such termination.

Provided always that, against any payments due from the Employer under this Sub-Clause, the Employer shall be entitled to be credited with any outstanding balances due from the Contractor for advances in respect of Plant and materials, and any sum previously paid by the Employer to the Contractor in respect of the execution of the Works."

21. The ICC held that the total amount due to the Consortium under these clauses was DEM 53,878,221. This amount was in respect of three components: (i) cost of work executed until 31 December 1991; (ii) additional costs incurred until 31 December 1991; and (iii) recurrent costs (storage, insurance, etc.) incurred between 1 January and 31 May 1992.

22. By 16 September 1999, APICORP had paid the Consortium the total amount of the arbitration award.

23. The Consortium asserts that the arbitration award does not compensate it for the full amount of its losses incurred under the STTP contract. It seeks compensation before the Commission in the amount of USD 1,142,467 for "engineering performed but not considered by the Award". The Consortium asserts that as at 2 August 1990, it had performed 94.33 per cent of the engineering work, but delivered and invoiced only 86.25 per cent of the equipment. This meant that 8.08 per cent of the engineering services, relating to the equipment never delivered, in the amount of USD 1,142,467, remains uninvoiced and unpaid.

24. The Consortium maintains in its response to the article 34 notification that there is no overlap between its claim before the Commission and the arbitration award. It asserts that the claim for unpaid engineering services was included in the submission for arbitration but no award was made in respect of it. Indeed, it asserts that, for reasons unclear to it, the ICC did not consider this point of its submission.

2. Analysis and valuation

25. On the evidence put before it, in the view of the Panel, the Consortium maintained the claim for unpaid engineering services in the arbitration. The Consortium asserts that no award was made in respect of that claim.

26. However, first, it is not clear to the Panel that that is in fact the case. The Consortium certainly did not demonstrate that the award of over DEM 53 million did not in fact include an allowance for the unpaid engineering services. As such, the Consortium has not established that it

suffered a loss. But, even if there was no such allowance, that would simply mean that the arbitral panel had rejected the claim as not maintainable. There might be many reasons why an arbitral tribunal after a lengthy and detailed investigation of the matter might have reached such a conclusion. These reasons could include a determination that no such loss occurred or that it was otherwise caused. What is clear is that there is no material before the Panel upon which it can conclude that this claim represents an uncompensated loss. Proof of a loss is essential if a claim is to be considered by the Panel.

3. Recommendation

27. The Panel recommends no compensation for contract losses.

B. Loss of profits

28. The Consortium seeks compensation in the amount of USD 4,133,008 (DEM 6,676,874) for loss of profits. The Consortium states that for 1989-1992, Spie Batignolles and its wholly-owned subsidiary Abay Engineering had "group-wide overheads (head office general expenses)" averaging 9.84 per cent. Its gross profit margin was three per cent. It therefore asserts that the total of "lost profits" is 12.84 per cent of DEM 52,000,578 (the total contract price less amounts already paid), namely DEM 6,676,874, which the Consortium converted to USD 4,133,008.

29. The Panel finds that the Consortium had an existing contractual relationship with ARADET.

30. However, the Panel finds that the continuation of this relationship was not rendered impossible directly by Iraq's invasion and occupation of Kuwait. As noted at paragraph 18, supra, the ICC, in its arbitration award, found that the STTP contract was frustrated only in May 1992 when it became clear that the contract would not be resumed because of the trade sanctions against Iraq. The Panel finds that any loss of profits incurred by the Consortium were not directly caused by Iraq's invasion and occupation of Kuwait, but by the trade sanctions against Iraq. These sanctions prevented the resumption of the STTP contract after the cessation of hostilities in Kuwait.

31. The Panel further finds that the Consortium failed to fulfil the evidentiary standard for loss of profits claims set out in paragraphs 125 to 131 of the Summary.

32. The Panel recommends no compensation for loss of profits.

C. Loss of tangible property

1. Facts and contentions

33. The Consortium seeks compensation in the amount of USD 3,311,645 for loss of tangible property. The Consortium asserts that by 2 August 1990 most of the essential assets required for the project had been deployed to the project site. The Consortium asserts that the assets were abandoned on site at the time the works were stopped. It has been unable to recover the assets since their abandonment.

34. The Consortium did not state the precise circumstances of the loss of the assets. Its response to the article 34 notification asserts that "over the period 1992-1995, an important number of the Consortium's and the subcontractors' assets had been requisitioned by the Iraqi authorities".

35. More than half of the total claimed amount of USD 3,311,645 is claimed by the Consortium on behalf of its two sub-contractors, Instalexport and CCIC.

36. The Consortium asserts that the arbitration award included compensation in the amount of USD 1,039,170 for the loss of the use of the assets which the Consortium was forced to abandon at the project site. In the calculation of its claim before the Commission for the loss of tangible property, the Consortium has deducted this amount.

2. Analysis and valuation

37. The Panel finds that the Consortium provided sufficient evidence, in relation to most of the items claimed, to prove: (a) that it, or Instalexport or CCIC, owned the assets; and (b) that they were located at the STTP project site at the time of Iraq's invasion and occupation of Kuwait.

38. However, the Panel finds that the Consortium failed to provide sufficient evidence in relation to the date or cause of the loss. The documentation submitted in support of the claim indicates that at least some of the assets used on the STTP project were confiscated by the Iraqi authorities in 1992 and that other assets were confiscated as late as 1995.

3. Recommendation

39. Applying the approach taken with respect to the confiscation of tangible property by the Iraqi authorities after the liberation of Kuwait, as set out in paragraph 146 of the Summary, the Panel recommends no compensation for loss of tangible property.

D. Mitigation expenses

40. The Consortium seeks compensation in the total amount of USD 3,581,580 for "costs to reduce the amount of the claim". The costs

comprise legal fees incurred in respect of the arbitration proceedings before the ICC (USD 2,645,533), transportation expenses that the Consortium agreed to pay APICORP in order to obtain payment under the arbitration award (USD 685,621), and storage and insurance costs that the Consortium agreed to pay APICORP in order to obtain payment under the arbitration award (USD 250,426).

41. The Consortium asserts that had the legal fees, transportation expenses, and storage and insurance costs not been incurred, it would not have obtained payment under the arbitration award, and the amount of the award could have formed part of its claim before the Commission.

42. The Panel finds that the legal fees, transportation expenses, and storage and insurance costs were not incurred as a direct result of Iraq's invasion and occupation of Kuwait. The Consortium elected to seek recovery of its losses on the STTP project before the ICC under the arbitration provision of the STTP project. The expenses of this process are an adjunct of this election, and not of Iraq's invasion and occupation of Kuwait.

43. The Panel recommends no compensation for mitigation expenses.

E. Summary of recommended compensation for the Consortium

44. Based on its findings regarding the Consortium's claim, the Panel recommends no compensation.

III. THE CLAIM OF SISSA CONSTRUCTION AND MANAGEMENT CORPORATION

45. Sissa Construction and Management Corporation ("Sissa") is a construction company incorporated in Canada. On 12 November 1990, Sissa entered into a contract with Iran Toseeh Company ("Iran Toseeh"), an Iranian corporation, for the development of Kish Island, in the Persian Gulf. The turnkey project involved the construction, equipment and furnishing of a modern luxury hotel, and a residential and shopping complex with associated public amenities on Kish Island.

46. The Kish Island Project was allegedly "cancelled" in October 1991 before any construction work had commenced "due to the invasion of Kuwait and air and water pollution of the area". The cancellation took place after Sissa had performed some initial design and mobilisation work on the project.

47. Sissa seeks compensation in the total amount of USD 159,718,942 for loss of profits and "other expenses" in connection with the Kish Island Project. Sissa also filed an alternative claim in the amount of USD 30,588,534 for unpaid contract amounts, in the event its claim for loss of profits and "other expenses" is unsuccessful.

A. Loss of profits

1. Facts and contentions

48. Sissa seeks compensation in the amount of USD 158,723,088 for loss of profits in connection with the Kish Island Project.

49. Under the terms of the contract for the development of Kish Island, Sissa was to "provide financing for the project, with the guarantee for repayment of Iran Toseeh and co-guarantee of Bank Meli Iran" as well as construction systems called "Multi-Fold Systems".

50. Payment under the contract was to be made in monthly instalments based on progress reports confirmed by Iran Toseeh's consulting engineer.

51. Sissa states that it commenced work on the Kish Island Project immediately after signing the contract. By 15 January 1991, Sissa had completed all designs, negotiated the funding of the project and completed negotiations with sub-contractors. Sissa states that, after 17 January 1991, the project was delayed "for months". In October 1991, Sissa was informed that the guarantees provided by Iran Toseeh for the project had been cancelled.

52. Sissa calculates its claim for loss of profits as ten per cent of the total "capital cost" for the Kish Island Project, which the contract estimated at USD 1,587,230,887. The contract provided that Sissa was to be compensated for its services in the amount of 2.5 per cent of the total "capital cost" of the project for each of the following items: (a)

construction supervision and management; (b) construction systems (multi-fold) and training; (c) architectural and engineering fee; and (d) procurement fee.

2. Analysis and valuation

53. In support of its claim, Sissa provided a feasibility report for the Kish Island Project as well as site plans and diagrams, photographs of models, target costings, design bases and assumptions and a time schedule. The Panel finds that the evidence provided by Sissa is not sufficient to show that the contract would have been profitable as a whole. Further, the Panel finds that Sissa's fees under the contract were payable as a percentage of "capital costs" that would have increased progressively as the development of Kish Island progressed. The fees would, therefore, have related to the progress of work under the contract and would not have been recovered on the lump sum basis stated by Sissa.

54. The Panel finds that Sissa failed to fulfil the evidentiary standard for loss of profits claims set out in paragraphs 125 to 131 of the Summary. Accordingly, the Panel recommends no compensation.

3. Recommendation

55. The Panel recommends no compensation for loss of profits.

B. "Other expenses"

56. Sissa seeks compensation in the amount of USD 995,854 for "other expenses" allegedly incurred in connection with the Kish Island Project. Sissa provided no information about the nature of its claim, apart from stating that it had been calculated "from billings that have been received as well as expenses of all travels, lodging, telecommunications, etc."

57. The Panel finds that Sissa failed to explain the nature of its losses and how they were directly caused by Iraq's invasion and occupation of Kuwait. Further, Sissa did not provide any evidence in support of its losses.

58. The Panel recommends no compensation for "other expenses".

C. Contract losses

59. Sissa claims for unpaid contract amounts. The claim is expressed as an alternative claim in the event that its claims for loss of profits and "other expenses" are unsuccessful. Sissa states that it is "willing to settle for the amount of USD 30,588,534, which will compensate for the funds spent up to date".

60. Iran Toseeh agreed to make available USD 15,000,000 for the mobilisation of the Kish Island Project upon the execution of the contract

and a further USD 25,000,000 "for down payment on equipments, furnishings and as start up funds for the construction of the warehouses".

61. Sissa alleges that it did not receive the downpayment of USD 40,000,000, as the cancellation of the contract intervened before this amount was paid. Further, Sissa "had employed independent contractors and had completed all architectural and engineering part of the Kish Island Project, and was obliged to pay USD 30,588,534 out of corporate funds" to architects and engineers.

62. Despite a specific request by the secretariat to do so, Sissa provided no evidence that Iran Toseeh accepted Sissa's claim for unpaid contractual amounts. Further, Sissa did not provide evidence in the form of agreements, orders or invoices with the architects and engineers. It provided no evidence that the payments were actually made.

63. The Panel finds that Sissa did not provide sufficient evidence in support of its losses.

64. The Panel recommends no compensation for contract losses.

D. Summary of recommended compensation for Sissa

65. Based on its findings regarding Sissa's claim, the Panel recommends no compensation.

IV. THE CLAIM OF ALEXANDRIA SHIPYARD COMPANY

66. Alexandria Shipyard Co. ("Alexandria"), a company existing under Egyptian law, is involved in the business of building and repairing maritime vessels. At the time of Iraq's invasion of Kuwait, Alexandria was undertaking repair work on the Iraqi commercial fleet for the Public Establishment for Maritime Transport. The work was being carried out pursuant to a protocol agreement for technical co-operation dated 20 November 1988.

67. Alexandria seeks compensation in the total amount of USD 15,356,626 for loss of profits, bank charges and interest. The interest element is in the amount of USD 6,029,131. For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to Alexandria's claim for interest.

68. In its original claim submission, Alexandria also sought compensation in the amount of USD 654,510 for contract losses (unpaid invoices for repair of ships and unpaid mooring fees). Alexandria later withdrew its claim for this loss item, stating that it had been able to obtain payment from the Iraqi employer of the amounts owing to it.

A. Loss of profits

1. Facts and contentions

69. Alexandria seeks compensation in the amount of USD 8,534,851 (DEM 13,000,000) for loss of profits. The claim is for the total profit that Alexandria expected to make under two contracts for the building and supply of ships (the "Ship-building Contracts"). Alexandria entered into the Ship-building Contracts with Hansa Bergen mbH & Co. ("Hansa Bergen"), a German marine transport company, on 30 August 1991. Alexandria estimates its lost profits under the Ship-building Contracts to be DEM 13,000,000.

70. The Ship-building Contracts provided for the building and supply of two 11,000 ton ships (vessels N14 and N15). The value of each contract was DEM 34.3 million. The ships were to be delivered within 21 months of the respective dates of entry into effect of the contracts.

71. On 29 August 1991, Alexandria entered into a contract with MPC Muenchmeyer Petersen GmbH & Co. KG ("Muenchmeyer"), a Hamburg-based shipping supplier, for the supply of components and equipment for the two ships (the "Supply Contract"). The Supply Contract took the form of Amendment No. 1 to a Technical Services Agreement between Alexandria and Muenchmeyer dated 31 January 1991. Under the Supply Contract, the value of the equipment to be supplied for each ship was DEM 27.8 million.

72. Alexandria states that, "for reasons in relation [to] the security of the region and other economic reasons, the contract for building and supplying both ships has been cancelled ...". Alexandria states that it

"did not execute the shipbuilding contract ... as the owner considered Middle East as a war area".

73. As a consequence of Hansa Bergen cancelling the Ship-building Contracts, Alexandria cancelled the Supply Contract.

74. Alexandria calculated its claim for loss of profits as the difference between the total value of the Ship-building Contracts (DEM 68.6 million) and the total value of the components and equipment to be supplied under the Supply Contract (DEM 55.6 million).

2. Analysis and valuation

75. In support of its claim, Alexandria provided copies of its planned budgets for the fiscal years 1991/92 and 1992/93. However, the Panel finds that the planned budgets do not constitute sufficient evidence that the Ship-building Contracts would have been profitable as a whole. Accordingly, the Panel finds that Alexandria failed to fulfil the evidentiary standard for loss of profits claims set out in paragraphs 125 to 131 of the Summary.

76. Further, given that the contracts were signed in late August 1991 (i.e., 6 months after the liberation of Kuwait), the Panel finds that their cancellation was not a direct result of Iraq's invasion and occupation of Kuwait. It follows that the losses arising out of the cancellation of the contracts were not a direct result of the invasion and occupation of Kuwait.

3. Recommendation

77. The Panel recommends no compensation for loss of profits.

B. Bank charges

1. Facts and contentions

78. Alexandria seeks compensation in the amount of USD 792,644 (2,623,652 Egyptian pounds (EGP)) for bank charges allegedly incurred in connection with the opening of two letters of credit with the Bank of New York, Frankfurt. The letters of credit were issued to the order of Muenchmeyer.

79. Under the terms of the Supply Contract, 67.88 per cent of the contract price was to be paid under an irrevocable letter of credit to be confirmed by a first class German bank. Twelve months after the date the Technical Services Agreement entered into effect, the letter of credit was to be increased by Muenchmeyer by a further 20 per cent.

80. Alexandria states that the documentary credits were cancelled upon the cancellation of the Ship-building Contracts, and "therefore, the company had to incur bank charges and commissions without consideration". Alexandria states that it incurred bank charges in the amount of EGP

2,623,652 in connection with the opening of the letters of credit. Alexandria converted this amount to United States dollars using the exchange rate EGP 3.31 to USD 1.

81. The charges include, "mail and telex charges", "L/C opening commission", "extension commission", "expenses for amending L/C" and "documentary credit increase commission".

82. Alexandria did not provide copies of the letters of credit. However, it did provide evidence that the letters of credit in the amount of DEM 27.8 million each were opened between 3 and 11 June 1991.

2. Analysis and valuation

83. The Panel finds that Alexandria failed to explain the direct link between the cancellation of the Ship-building Contracts, the incurring of the bank charges and Iraq's invasion and occupation of Kuwait. The Ship-building Contracts and the Supply Contract were entered into in late August 1991 (i.e., six months after the liberation of Kuwait). The Panel finds that the cancellation of the Ship-building Contracts and the related bank charges in connection with the letters of credit were not a direct result of Iraq's invasion and occupation of Kuwait.

3. Recommendation

84. The Panel recommends no compensation for bank charges.

C. Summary of recommended compensation for Alexandria

85. Based on its findings regarding Alexandria's claim, the Panel recommends no compensation.

V. THE CLAIM OF MISR CONCRETE DEVELOPMENT COMPANY

86. Misr Concrete Development Company ("Misr") is a construction company existing under Egyptian law. Prior to Iraq's invasion and occupation of Kuwait, Misr had been operating on construction projects in Iraq for over 20 years. At the time of Iraq's invasion of Kuwait, Misr was undertaking the construction of two Egyptian diplomatic mission buildings (the Chancery and the Ambassador's residence) in Baghdad (the "Embassy Project"). The work was being carried out pursuant to a contract with the Foreign Ministry of Egypt. Misr states that work on the Embassy Project stopped after 2 August 1990.

87. Misr seeks compensation in the total amount of USD 24,864,614 for loss of profits, loss of tangible property and financial losses.

A. Loss of profits

1. Facts and contentions

88. Misr seeks compensation in the amount of USD 3,200,000 (IQD 1,000,000) for loss of profits in relation to the Embassy Project. Misr states that Iraq's invasion and occupation of Kuwait rendered impossible the execution of the Embassy Project.

89. The contract between Misr and the Foreign Ministry of Egypt was signed by the parties on 5 March 1990. The total value of the contract was "estimated" by the parties to be IQD 5,000,000. The final costs were to be determined by a management committee appointed to the project. The works were to be completed within a period of 30 months from the date of fulfilment of the conditions precedent specified in the contract.

90. On 30 June 1990, the Egyptian Embassy in Baghdad deposited the advance payment in the amount of IQD 250,000 in Misr's bank account with the Rafidain Bank, Erkhita branch. Misr states that the advance payment "was spent on performing work relative to site preparation as well as on salary and accommodation of employees both in headquarters and the branch".

91. Upon fulfilment of the conditions precedent, Misr took delivery of the site and commenced mobilisation operations on the project.

92. By the end of July 1990, Misr had purchased equipment locally in Iraq and arranged for technicians, workers and equipment to leave Egypt for Iraq.

93. Misr states that, after Iraq broke off diplomatic relations with Egypt, "most Egyptians working in Iraq had to leave the country in chaotic and threatening circumstances". As a result, the project manager was requested to close Misr's office and to evacuate all Egyptian workers. Work on the Embassy Project was suspended, and on 11 August 1990, the workers left Baghdad for Aqaba.

94. Misr "fully expected to realise a profit margin of 20 per cent on the contract price, i.e. a profit of IQD 1,000,000". Misr converted its asserted losses using the exchange rate USD 1.00 to IQD 3.20 to arrive at a total claimed amount for loss of profits of USD 3,200,000.

2. Analysis and valuation

95. In support of its claim, Misr provided copies of its annual budget for the 1989 financial year. Misr stated that its Baghdad branch office accounts for previous years had been left behind in Iraq. The Panel considers that the annual budget for 1989 is insufficient to establish loss of profits on the Embassy Project. Misr failed to demonstrate that the contract would have been profitable as a whole. Accordingly, the Panel finds that Misr failed to fulfil the evidentiary standard for loss of profits claims set out in paragraphs 125 to 131 of the Summary.

96. Further, the Panel finds that Misr failed to make allowance in its claim for the advance payment of IQD 250,000. Although Misr listed the items on which the advance payment was spent, it did not provide a breakdown of the amounts spent in respect of each item and provided no documentary back-up in support of the amounts spent.

3. Recommendation

97. The Panel recommends no compensation for loss of profits.

B. Loss of tangible property

98. Misr seeks compensation in the amount of USD 100,000 for loss of tangible property. The claim is for tangible property left behind at two apartments in Baghdad and at Misr's Baghdad branch office after its personnel were evacuated from Iraq. The abandoned items include electrical appliances, furniture, furnishings, office equipment and a vehicle.

99. Misr states that Iraq's invasion and occupation of Kuwait "triggered a chain of events in Iraq which forced Misr's representatives to leave Iraq with the branch's property unattended". Between March 1992 and June 1994, Misr attempted to send its representatives back to Iraq to check on its property, however, the Iraqi authorities denied them the necessary entry visas. Misr states that it "did not give up and tried through its lawyer in Baghdad to reverse the decision but to no avail, until the Military Industrialisation Authority [of Iraq] confiscated company property".

100. The Panel finds that Misr did not provide sufficient evidence of its ownership of the lost items and their presence in Iraq in August 1990. Furthermore, applying the approach taken with respect to the confiscation of tangible property by the Iraqi authorities after the liberation of Kuwait, as set out in paragraph 146 of the Summary, the Panel is unable to recommend compensation.

101. The Panel recommends no compensation for loss of tangible property.

C. Financial losses

102. Misr seeks compensation in the amount of USD 21,564,614 for financial losses. The claim is for unrecovered costs incurred on the Embassy Project (USD 800,000; amount of loss in original currency: IQD 250,000); cash in bank account (USD 14,307,017; amount of loss in original currency: IQD 4,470,943); cash and receivables (USD 19,439; amount of loss in original currency: IQD 6,075) and interest (USD 6,438,158).

103. For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to Misr's claim for interest.

(a) Unrecovered costs incurred on the Embassy Project

104. Misr seeks compensation in the amount of IQD 250,000 for unrecovered costs incurred on the Embassy Project. Misr describes this loss item as a claim for "down payment in bank account", as the amounts expended by Misr on the Embassy Project were withdrawn from the amount paid to it as a down payment (advance payment) by the Egyptian embassy in Baghdad. The contract required the Foreign Ministry of Egypt to make a down payment of five per cent of the estimated costs for the works (IQD 5,000,000) against a letter of guarantee to be given by Misr. Documents submitted with the claim show that the down payment was paid to Misr.

105. Misr states that, during the preliminary stages of the Embassy Project, "it incurred expenses which consumed the whole of the down payment".

106. The down payment "was spent on performing work relative to site preparation as well as on salary and accommodation of employees both in headquarters and the branch". Misr states that the following amounts were paid: (a) IQD 43,000 for "preliminary works connected with the contract"; and (b) USD 12,000 to an Iraqi firm specialising in soil investigation and bore-testing. A further unstated amount was used by Misr to purchase locally "some urgently needed equipment and caravans". However, Misr did not provide evidence in the form of receipts or invoices that these amounts were paid.

107. The Panel finds that the down payment received by Misr was an advance payment. Applying the approach with respect to advance payments set out in paragraphs 64 to 67 of the Summary, the Panel finds that claimants must account for those payments in reduction of their claims. Misr failed to account for the advance payment in reduction of its claim. Accordingly, any amounts of compensation recommended by the Panel must be reduced by the amount of the advance payment.

108. The Panel also finds that Misr provided no evidence that it incurred the expenses in the start-up of the Embassy Project. Further, Misr did not

demonstrate that the amounts were incurred as a direct result of Iraq's invasion and occupation of Kuwait.

(b) Cash in bank account

109. Misr states that it had cash in the amount of IQD 4,470,943 deposited with the Rafidain Bank, Baghdad branch, and that this amount was frozen by the Iraqi authorities after Iraq's invasion of Kuwait. It further states that, in April 1992, the amount was sequestrated by the Iraqi authorities pursuant to a decree of the Council of Ministers of Iraq.

110. The cash balance held with the Rafidain Bank, Baghdad branch, comprised Misr's profits earned during more than 20 years of contracting business in Iraq. Misr seeks compensation for the confiscated funds (IQD 4,470,943), which it states are equivalent to USD 14,307,017.

111. Applying the approach taken with respect to loss of funds in bank accounts in Iraq set out in paragraphs 135 to 139 of the Summary, the Panel recommends no compensation.

(c) Cash and receivables

112. Misr seeks compensation for cash and receivables left behind at its branch office in Baghdad. The amount of the claim is USD 19,439 (IQD 6,075) (amended from the original claim in the amount of USD 53,088 (IQD 16,590)).

113. Applying the approach taken with respect to loss of petty cash in Iraq set out in paragraph 140 of the Summary, the Panel recommends no compensation for lost cash and receivables.

Recommendation

114. The Panel recommends no compensation for financial losses.

D. Summary recommended compensation for Misr

115. Based on its findings regarding Misr's claim, the Panel recommends no compensation.

VI. THE CLAIM OF TECHNIP S.A.

116. Technip S.A. ("Technip") is a corporation existing under the laws of France.

117. Technip seeks compensation in the total amount of USD 44,542,630 (converted by Technip to 233,914,564 French francs (FRF)) for contract losses, losses related to a business transaction or course of dealing, loss of profits, loss of tangible property, payment or relief to others, and financial losses. The claims are for losses arising out of two projects in Iraq - the Zubair Project and the Baiji Project.

118. On 30 July 1984, Technip entered into a contract with the State Company for Oil Projects in Iraq ("SCOP") for the design and construction of a lubricant production plant in Baiji (the "Baiji Contract"). This contract was completed on 11 October 1989, but Technip asserts that SCOP has not yet paid certain retention monies.

119. On 29 June 1989 it signed an Addendum to a contract entered into on 31 August 1983 with SCOP for the remodelling of LPG/NLG units in Zubair (the "Zubair Addendum"). Technip asserts that the Zubair Addendum was suspended due to Iraq's invasion and occupation of Kuwait.

A. Contract losses

(a) Baiji Contract

120. Technip seeks compensation in the amount of USD 830,000 for contract losses on the Baiji Contract.

121. In the "E" claim form, Technip characterised this loss element as "other", but the Panel finds that it is more accurately described as contract losses.

122. Technip asserts that SCOP did not pay an amount of USD 2,360,000, "representing an instalment equal to 2 per cent of the price of the contract attached to final acceptance", due to Iraq's invasion and occupation of Kuwait. However, because Technip obtained a "partial reimbursement" of USD 1,530,000 from Compagnie Française d'Assurance pour le Commerce Extérieur ("COFACE"), it limits its claim to USD 830,000.

123. The Panel finds that under the terms of the Baiji contract and according to the date of the final acceptance certificate the amount of USD 2,360,000 became due and payable prior to 2 May 1990. The claim is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation.

(b) Zubair Addendum

124. Technip seeks compensation in the amount of USD 7,511,411 (FRF 33,939,858 and IQD 322,448) for contract losses on the Zubair Addendum.

125. Technip asserts that the Zubair Addendum was in the "ultimate completion stage" when Iraq invaded Kuwait and the staff of both Technip and its subcontractors were forced to "gather in Baghdad". It asserts that SCOP has not paid the invoices described in table 1, infra, due to Iraq's invasion and occupation of Kuwait.

Table 1. Technip's claim for contract losses on the Zubair Addendum

Date of invoice	Nature of work	Amount of invoice
29 March 1990	For performance bond/retention money guarantee	FRF 137,643
18 August 1990	For 10 per cent upon beginning of test run on the second LPG unit	FRF 9,700,000
17 October 1990	For "excess man/months from September 13 to October 15, 1990"	FRF 7,343,381 IQD 121,550
11 December 1990	For "excess man x months above the Addendum"	FRF 3,178,834 IQD 59 778
31 December 1990	For "final payment of the June 29, 1989 Addendum as per its Article 7.4"	FRF 13,580,000 IQD 141,120
Total		FRF 33,939,858 IQD 322,448

126. The Panel finds that SCOP is an agency of the State of Iraq.

127. The Panel finds that the invoice in respect of "performance bond/retention money guarantee" (invoice dated 29 March 1990) became due and payable prior to 2 May 1990. The claim is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation.

128. The Panel finds that the invoices dated 18 August 1990 and 31 December 1990 relate to work performed after 2 May 1990. The Panel is satisfied that Technip is entitled to payment of the invoices under

Articles 5 and 7.4 of the Zubair Addendum. The Panel recommends compensation in the amounts claimed.

129. The invoices dated 17 October 1990 and 11 December 1990 relate to "excess man x months". Article 4.3 of the Addendum between Technip and SCOP provides that Technip is entitled to payment for "excess man x months" only where the excess man-months are not due to reasons attributable to Technip. Technip provided no evidence that this was the case. Accordingly, the Panel is unable to recommend compensation.

Recommendation

130. The Panel recommends compensation in the amount of USD 4,894,815 for contract losses.

B. Business transaction or course of dealing

131. Technip seeks compensation in the amount of USD 1,292,840 (FRF 6,777,066) for losses related to a business transaction or course of dealing. It asserts that at the time of Iraq's invasion and occupation of Kuwait it had incurred costs drawing up the "technical and commercial proposals" for one contract which had been signed, and for another contract in respect of which it had obtained a letter of intent. Because of Iraq's invasion and occupation of Kuwait, these contracts were never performed, and the costs never recovered.

132. Technip describes the two contracts as follows:

> "- LLDPE unit (Linear Low Density Polyethylene) complex No. 2 Baghdad, client: TECHCORPS, signed on April 13, 1989.
>
> - AL KAIM fertilizers units, client: Ministry of Industry, letter of intent dated March 2, 1989."

133. The Panel finds that the commercial proposal costs were not directly caused by Iraq's invasion and occupation of Kuwait. The cost of work undertaken for the submission of tenders is a normal cost to the contractor who takes a risk of not obtaining the contract. The Panel further notes that at least part of the costs were incurred prior to 2 May 1990 and are for that reason outside the jurisdiction of the Commission.

134. The Panel recommends no compensation for business transaction or course of dealing.

C. Loss of profits

135. Technip seeks compensation in the amount of USD 31,142,694 (FRF 163,250,000) for loss of profits on the two contracts that are the subject of the above claim for losses related to a business transaction or course of dealing (see paragraphs 131 to 134, supra).

136. In the "E" claim form, Technip characterised this loss element as "losses related to a business transaction or course of dealing", but the Panel finds it is more accurately described as loss of profits.

137. Technip asserts that the two contracts were expected to "generate for Technip a net profit margin of about 5 per cent on the basis of the profit previously made by Technip on similar jobs". The loss of profits is therefore calculated as five per cent of the total value of the contracts, i.e.:

"LLDPE complex no. 2: FRF 430,000,000 * 5 per cent = 21,500,000

fertilizers Al Kaim: FRF 2,835,000,000 * 5 per cent = 141,750,000."

138. In support of its claim, Technip provided a signed contract in relation to the LLDPE complex, a letter of intent in relation to the Al-Qaim fertilizers project and internal cost accounting records showing the expenses incurred in respect of the two projects in the period 20 February 1989 to 11 June 1991. However, Technip provided no evidence that it generated a profit margin of five per cent on previous projects. The Panel finds that the evidence submitted by Technip does not constitute sufficient evidence that the projects would have been profitable as a whole.

139. Applying the approach taken with respect to loss of profits for future projects set out in paragraphs 132 to 134 of the Summary, the Panel recommends no compensation for loss of profits.

D. Loss of tangible property

140. Technip seeks compensation in the amount of USD 61,309 (IQD 19,067) for loss of tangible property. Its only explanation of its claim is that "further to repatriation of our personnel held as hostages, our company had to abandon in Iraq the furniture and office equipment assigned to our office in Baghdad".

141. The Panel finds that Technip did not provide sufficient evidence (a) of its ownership of the assets, (b) of the cost of the assets, or (c) that these items were in Iraq on 2 August 1990.

142. The Panel recommends no compensation for loss of tangible property.

E. Payment or relief to others

1. Facts and contentions

143. Technip seeks compensation in the total amount of USD 1,154,752 (FRF 6,053,210) for payment or relief to others, including salaries and welfare costs (USD 99,370; FRF 520,895); accommodation and living expenses in Baghdad and on site (USD 804,552; IQD 253,911; converted by Technip to FRF 4,217,462); and personnel secondment costs invoiced by subcontractors (USD 250,830; FRF 1,314,853).

144. Technip asserts that at the time of Iraq's invasion and occupation of Kuwait, it had four employees in Iraq and used the services of 40 employees of non-Iraqi subcontractors. It asserts that all of these persons were held hostage between 2 August and 29 October 1990 and that it continued to bear the cost of salaries, welfare costs, and accommodation and living expenses during this time.

2. Analysis and valuation

145. The Panel finds that the salaries allegedly paid by Technip to its four employees are prima facie compensable as salary paid for unproductive labour. However, Technip has only provided sufficient evidence to substantiate its loss in relation to one of its employees. Technip provided copies of employment contracts and pay-roll records in relation to all four employees. However, only in respect of one employee did it provide an attestation from the French Ministry of Foreign Affairs proving that he was detained in Iraq. The Panel recommends compensation in the amount of FRF 129,496 for salaries and welfare costs.

146. The Panel finds that Technip did not provide sufficient evidence to substantiate its claim for accommodation and living expenses in respect of all 44 persons the subject of the claim. However, the Panel is satisfied that one employee was detained in Iraq. Further, although there are difficulties with the petty cash and bank records submitted in support of the claim for the accommodation and living expenses in respect of the individual concerned, there is sufficient evidence that the expenses were incurred, and the Panel assesses the loss at USD 2,000 (FRF 10,484).

147. The Panel finds that Technip did not provide sufficient evidence to substantiate its claim for personnel secondment costs. It submitted invoices and payment vouchers, however, it did not demonstrate that the personnel were detained in Iraq or that it incurred a loss directly caused by Iraq's invasion and occupation of Kuwait.

3. Recommendation

148. The Panel recommends compensation in the amount of USD 26,704 (FRF 139,980) for payment or relief to others.

F. Financial losses

149. Technip seeks compensation in the amount of USD 2,549,624 (FRF 13,365,128) for financial losses, including (a) frozen bank accounts/petty cash (USD 677,556; IQD 213,832; converted by Technip to FRF 3,551,749) and (b) "call up for guarantee (Baiji Contract)" (USD 1,872,068; FRF 9,813,379).

(a) Frozen bank accounts/petty cash

150. Technip asserts that "further to invasion of Kuwait by Iraq and to the measures taken by Iraqi authorities, our company has to abandon its residual monetary assets there". It seeks compensation in respect of amounts held in three bank accounts with the Rafidain Bank, Iraq, and petty cash kept at the Zubair and Baiji Project sites.

151. Applying the approach taken with respect to loss of funds in bank accounts and loss of petty cash in Iraq, set out in paragraphs 135 to 130 of the Summary, the Panel recommends no compensation for loss of funds.

(b) Call up for guarantee on Baiji Contract

152. Technip asserts that in respect of the Baiji Contract (see paragraphs 120 to 123, supra), COFACE granted the financing banks a 100 per cent guarantee in exchange for a countersecurity by Technip in the amount of two per cent of the "export customer credit utilizations, i.e. USD 1,530,000". When the Iraqi borrower became insolvent, Technip called on its guarantee to the extent of 2 per cent of each payment made by COFACE. It seeks compensation in respect of the guarantees which COFACE had called up as at 31 July 1993 (FRF 8,467,301) and the guarantees which, as at 31 July 1993, it expected COFACE to call up in the future (FRF 1,346,078).

153. The Panel finds that Technip failed to prove that the stated losses were directly caused by Iraq's invasion and occupation of Kuwait. Accordingly, the Panel recommends no compensation for "call up for guarantee on Baiji Contract".

G. Summary of recommended compensation for Technip

154. Based on its findings regarding Technip's claim, the Panel recommends compensation in the amount of USD 4,921,519. The Panel finds the date of loss to be 2 August 1990.

VII. THE CLAIM OF ENTERPRISE MULLER FRERES - TRAVAUX PUBLICS S.A.

155. Enterprise Muller Freres - Travaux Publics ("Muller Freres"), a corporation existing under French law, seeks compensation in the amount of USD 1,552,629 (406,975,217 CFA Franc bceac (XOF)) for unpaid contract amounts. The amounts claimed relate to work performed on the construction of a road between Zinder and Agadez in Niger.

156. The claim contains a number of formal deficiencies. The claim was not accompanied by an "E" claim form. The claim is entirely in French with no English translation. In addition, Muller Freres failed to provide a Statement of Claim and documents in English evidencing the name, address and place of its incorporation.

157. On 30 September 1998, Muller Freres was sent an article 15 notification requesting it to remedy such deficiencies on or before 30 March 1999. Muller Freres failed to respond to the notification. On 22 April 1999, Muller Freres was sent a reminder article 15 notification requesting it to remedy the deficiencies on or before 23 June 1999. Once again, Muller Freres failed to respond to the notification.

158. The Panel considered such information and documentation as had been submitted by Muller Freres and found it to be insufficient to support any of its claims. Therefore, the Panel finds that Muller Freres both failed to fulfil certain formal requirements and to submit sufficient information and documentation to support the asserted losses.

159. Based on its findings regarding Muller Freres' claim, the Panel recommends no compensation.

VIII. THE CLAIM OF ABB SCHALTANLAGEN GMBH

160. ABB Schaltanlagen GmbH ("ABB Schaltanlagen") is a German company involved in the development, manufacture and marketing of switchgear and related equipment and products.

161. ABB Schaltanlagen seeks compensation in the total amount of USD 16,635,422 (61,068,635 UAE dirhams (AED)) for contract losses and interest in connection with the Al Ain International Airport Project in Abu Dhabi.

162. The interest element is in the amount of USD 3,445,790 (AED 12,649,499). For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to ABB Schaltanlagen's claim for interest.

A. Contract losses

1. Facts and contentions

163. ABB Schaltanlagen seeks compensation in the amount of USD 13,189,632 (AED 48,419,136) for contract losses, including "acceleration" (AED 1,110,421), "loss of productivity" (AED 4,621,594), "costs resulting from prolongation" (AED 26,842,380), "idle time" (AED 7,887,994), "demobilisation/remobilisation" (AED 972,874), "additional management resources" (AED 1,870,122), "damage to works" (AED 386,320) and "additional increases in costs on contract works" (AED 4,727,431).

164. On 8 August 1988, Brown Boveri & Cie Aktiengesellschaft ("Brown Boveri"), the legal predecessor to the parent company of ABB Schaltanlagen, Asea Brown Boveri AG, and its joint venture partner, Rapco Buildings ("Rapco"), a company existing under the laws of Abu Dhabi, United Arab Emirates, entered into a contract with the Abu Dhabi Public Works Department (the "Public Works Department"). The contract was for the construction and maintenance of power supplies and aviation ground lighting for the Al Ain International Airport. The total value of the contract was AED 135,822,739. The project site was handed over to the joint venture, and work commenced, on 22 August 1988. The contract provided for a 30 month period for the completion of the works commencing on the date of handover of the site. The completion date was, therefore, expected to be 22 February 1991.

165. The Panel notes that the party to the joint venture agreement with Rapco and to the contract with the Public Works Department was Brown Boveri. ABB Schaltanlagen provided a confirmation that Brown Boveri changed its name to Asea Brown Boveri AG on 8 June 1988 and stated that the contract with the Public Works Department was "passed on to a wholly owned subsidiary company, ABB Schaltanlagen GmbH." However, ABB Schaltanlagen did not provide evidence of a formal assignment of the claim from Asea Brown Boveri AG to ABB Schaltanlagen GmbH.

166. ABB Schaltanlagen states that the progress on the project was severely delayed as a result of Iraq's invasion and occupation of Kuwait. According to ABB Schaltanlagen, the Public Works Department allowed the project site to be occupied by "United Nations" and United States military forces between 8 August 1990 and 22 May 1991. ABB Schaltanlagen states: "During this period, severe restrictions were placed by the military on the activities of ABB Schaltanlagen and all other contractors employed on the site".

167. ABB Schaltanlagen states that it had to "partially demobilise and remobilise". In addition, even after the military restrictions were lifted, it was affected by delays affecting "other trades", presumably suppliers and sub-contractors.

168. ABB Schaltanlagen provided no statement of claim. The only documents provided which describe the nature of its claim are the documents entitled "Further written notice of delays and application for extension of time by the joint venture" dated February, June and August 1991. These are the written submissions made by the joint venture to the Public Works Department outlining the joint venture's claims for compensation by the Public Works Department and its requests for extension of the completion date of the project.

169. In its response to the article 34 notification, ABB Schaltanlagen stated that, after its original claim submission was filed, it received payment in the amount of AED 17,612,848 from the Public Works Department. However, in its response, it did not specify which items included in its claim were accepted by the Public Works Department and which items were rejected.

170. On 17 November 1999, the Panel issued a procedural order in which it requested ABB Schaltanlagen to explain how the amount of AED 17,612,848 was arrived at and which of the items included in ABB Schaltanlagen's claim to the Public Works Department the amount covered. The Panel further requested ABB Schaltanlagen to provide a detailed breakdown of the amount paid by the Public Works Department.

171. In its response to the additional questions raised by the Panel, ABB Schaltanlagen provided copies of correspondence between itself and the Public Works Department and the project engineers as well as three reports dated from June to November 1992 made by the project engineers. The reports contain assessments of ABB Schaltanlagen's claim for reimbursement filed with the Public Works Department, and were prepared at the behest of the Public Works Department.

172. The engineers' final assessment of ABB Schaltanlagen's claim included in their report dated November 1992 was in the total amount of AED 14,336,403.

173. However, the correspondence provided confirms that ABB Schaltanlagen did not accept the amount recommended by the project engineers and entered into discussions with the Public Works Department after the engineers' final report was submitted.

174. ABB Schaltanlagen states that it "subsequently entered into negotiations with the client's representatives, which culminated in an increased assessment in the total sum of AED 17,612,848". The negotiations commenced in about June 1993. In June 1996, ABB Schaltanlagen signed a final discharge and settlement of all its outstanding claims. In signing that document, ABB Schaltanlagen agreed to accept the sum of AED 11,050,125 in final settlement of all its claims. The amount was calculated as follows:

Table 2. ABB Schaltanlagen's settlement with the Abu Dhabi Public Works Department

Item	Amount (AED)
Compensation for stoppage of work	17,612,848
Compensation for outstanding items in the final account	2,437,277
Deduction of the advance payment	(9,000,000)
Total	11,050,125

2. Analysis and valuation

175. Leaving aside the issue of the proper claimant to file the claim with the Commission, the Panel finds that the amounts claimed were included in the settlement reached between ABB Schaltanlagen and the Public Works Department. ABB Schaltanlagen signed a final discharge and settlement of all its outstanding claims against the Public Works Department. Prima facie once a claimant's claims are settled, no claim remains to be pursued. In that event it is necessary to review the filed material to ascertain if there is any basis which displaces the prima facie view. Absent such material, ABB Schaltanlagen has not established a loss and, therefore, the Panel is unable to recommend compensation.

3. Recommendation

176. The Panel recommends no compensation for contract losses.

B. Summary of recommended compensation for ABB Schaltanlagen

177. Based on its findings regarding ABB Schaltanlagen's claim, the Panel recommends no compensation.

IX. THE CLAIM OF THE IRBID DISTRICT ELECTRICITY COMPANY

178. The Irbid District Electricity Company ("IDEC") is a Government entity existing under the laws of Jordan. It seeks compensation in the total amount of USD 1,444,824 (950,694 Jordanian dinars (JOD)) for contract losses, losses related to a business transaction or course of dealing, and interest.

179. The interest element is in the amount of USD 430,912 (JOD 283,540). For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to IDEC's claim for interest.

A. Contract losses

1. Facts and contentions

180. IDEC seeks compensation in the amount of USD 611,100 (JOD 402,104) for contract losses, including (a) costs incurred because of the delay on a contract with Transelektro, a Hungarian company, for the supply of certain electrical equipment (the "Transelektro Contract") (JOD 250,120); and (b) costs incurred because of the delay on a contract with Electro-Mechanical & Communication Engineers ("ELMACO"), an Egyptian company, for the supply of transformers (the "ELMACO Contract") (JOD 151,984).

(a) Transelektro Contract

181. On 31 October 1989, IDEC entered into a contract with Transelektro for the supply of "a main substation designed to provide electricity to the Irbid Industrial Estate". IDEC asserts that "two of the main transformers" were supposed to arrive in Jordan in January 1991, but due to Iraq's invasion and occupation of Kuwait, did not arrive until 29 March 1992. IDEC did not provide any further explanation of the reasons for the delay.

182. IDEC asserts that the one-year delay caused an increase in the contract price from JOD 415,409 to JOD 574,829, resulting in a loss of JOD 159,420.

183. IDEC further asserts that labour and other costs associated with the Transelektro contract continued to be paid during the one-year delay, resulting in a loss of JOD 90,700.

(b) ELMACO Contract

184. On 18 March 1990, IDEC entered into a contract with ELMACO for the supply of 70 distribution transformers. The transformers were due to be supplied by September 1990 "at the latest". IDEC asserts that, due to Iraq's invasion and occupation of Kuwait, the equipment did not arrive in Jordan until September 1991. IDEC did not provide any further explanation of the reasons for the delay.

185. IDEC asserts that during the one-year delay, the value of the Jordanian dinar decreased significantly. As a result of this decrease, IDEC asserts that the contract price of USD 288,050 cost IDEC JOD 232,744 in September 1991, JOD 76,984 more than the amount it would have cost if there had been no delay.

186. IDEC further asserts that during the one-year delay, "in order to mitigate its damages, [it] decided to place an urgent order for 10 distribution transformers with another company, Matlec". It seeks compensation in the amount of JOD 75,000 for the cost of the transformers.

187. In its response to the article 34 notification, IDEC stated that it received four transformers and the amount of USD 8,108 as "a compensation for" the ELMACO contract.

2. Analysis and valuation

188. The Panel finds that IDEC did not provide sufficient evidence that the losses, allegedly incurred because of the delays on the Transelektro Contract and the ELMACO Contract, were directly caused by Iraq's invasion and occupation of Kuwait. The equipment was finally delivered in March 1992 for the Transelektro Contract, and in September 1991 for the ELMACO Contract. The Panel finds that such extended delays were not directly caused by Iraq's invasion and occupation of Kuwait.

189. Given that the delays on the Transelektro Contract and the ELMACO Contract were not directly caused by Iraq's invasion and occupation of Kuwait, it follows that the costs which IDEC asserts it incurred because of these delays were not directly caused by Iraq's invasion and occupation of Kuwait.

190. The Panel further finds that the alleged increases in the contract price of the Transelektro Contract and the ELMACO Contract, because of the fall of the Jordanian dinar, were not directly caused by Iraq's invasion and occupation of Kuwait. The fall of the Jordanian dinar was due to a combination of economic factors existing at that time.

191. In respect of the 10 transformers allegedly purchased because of the delay on the ELMACO Contract, the Panel further finds that IDEC did not provide sufficient evidence that it would not have purchased these transformers in any event, whether or not the transformers purchased from ELMACO had arrived on time.

192. The Panel finds that IDEC did not provide sufficient evidence in support of its assertions. In relation to the Transelektro Contract, it provided no evidence that the two transformers arrived late, that the contract price increased, or that the losses in respect of wages, cars, storage and transportation, were in fact incurred. In relation to the ELMACO contract, it provided no evidence that it paid the increased contract price.

3. Recommendation

193. The Panel recommends no compensation for contract losses.

B. Business transaction or course of dealing

1. Facts and contentions

194. IDEC seeks compensation in the amount of USD 402,812 (JOD 265,050) for losses related to a business transaction or course of dealing, including (a) decreased electricity revenues in the year beginning August 1990 (JOD 108,000); (b) overtime hours worked by IDEC's staff on an emergency basis during Iraq's invasion and occupation of Kuwait (JOD 101,250); and (c) losses resulting from a Government order for the reduction of street lighting (JOD 55,800).

2. Analysis and valuation

(a) Lost revenue

195. In August 1990, the Government of Jordan issued electricity conservation guidelines which ordered Jordanian electricity providers, including IDEC, to take certain steps to reduce electricity consumption. IDEC asserts that its estimated growth rate for 1991 was 9 per cent and the growth rate actually achieved by it was 5.26 per cent. IDEC asserts that its loss of anticipated growth rate of 3.74 per cent caused it to lose revenue in the amount of JOD 108,000.

196. The Panel finds that IDEC provided sufficient evidence to show that the Government of Jordan issued directives with a view to decreasing electricity consumption. However, the Panel finds that IDEC did not provide sufficient evidence to enable the Panel to establish the quantum of the claimed loss with reasonable certainty.

197. The documents provided by IDEC indicate that the growth rate for 1988 was 17 per cent, and the growth rate for 1989 was 5 per cent. IDEC provided no evidence to explain the deterioration of the growth rate in 1989, prior to Iraq's invasion and occupation of Kuwait. IDEC estimates that 12 gigawatt-hours ("GWh") of the total 14.2 GWh decline in growth rate in 1991 was due to Iraq's invasion and occupation of Kuwait. It did not provide evidence in support of this estimate. IDEC asserts that the profit per kilowatt-hours ("kWh") sold is JOD 0.009, based on an average sale price of JOD 0.030 per kWh less JOD 0.021 average cost. It did not provide detailed calculations to support these assertions.

(b) Overtime

198. IDEC asserts that "during the Gulf crisis, and due to the threats faced by Jordan from the Gulf War" the Government of Jordan ordered IDEC to employ ten engineers and 40 employees on an overtime basis for a period of

60 days. Twenty-five cars were also required for the 60 day period. IDEC does not describe the tasks performed by the engineers and employees during the 60 day period. It asserts that the cost of the engineers, employees and cars amounts to JOD 101,250.

199. The Panel finds that IDEC did not provide sufficient explanation about the nature of the overtime or the use of the cars to enable the Panel to determine whether the losses were directly caused by Iraq's invasion and occupation of Kuwait. Further, the Panel finds that IDEC did not provide sufficient evidence to support its assertions. The statement of claim calculates the loss on the basis of 10 engineers, 40 employees and 25 cars. However, the response to the article 34 notification amends this to two "main engineers", 14 "others", and 30 "other employees", without further explanation. The overtime charges do not correspond with the duty rosters provided by IDEC. The individual payroll records, despite being requested, have not been provided.

(c) Reduction of street lighting

200. IDEC states that the Government of Jordan, enforcing one of its electricity conservation measures, required IDEC to reduce street lighting for a period of six months. IDEC asserts that it thereby incurred a loss of JOD 55,800.

201. The Panel finds that IDEC did not substantiate its claim. IDEC provided a list of two engineers and eight employees indicating that they had an "overtime" entitlement for the period 15 January 1991 to 15 June 1991 totalling JOD 21,600. However, it did not explain how this amount related to the claimed amount of JOD 55,800. IDEC provided no evidence of the applicable rates of overtime, that the hours worked constitute "extra" work, or that the personnel were paid.

3. Recommendation

202. The Panel recommends no compensation for business transaction or course of dealing.

C. Summary of recommended compensation for IDEC

203. Based on its findings regarding IDEC's claim, the Panel recommends no compensation.

X. THE CLAIM OF THE JORDAN ELECTRIC POWER COMPANY

204. The Jordan Electric Power Company ("JEPCO") is a Government entity existing under the laws of Jordan. It seeks compensation in the total amount of USD 2,363,213 (JOD 1,554,994) for contract losses, losses related to a business transaction or course of dealing, and interest.

205. The interest element is in the amount of USD 835,958 (JOD 550,060). For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to JEPCO's claim for interest.

A. Contract losses

1. Facts and contentions

206. JEPCO seeks compensation in the amount of USD 543,775 (JOD 357,804) for contract losses, including (a) emergency expenditure on power cable purchased in October 1990 (JOD 343,621); and (b) the additional cost of procuring power cable in August 1992 (JOD 14,183).

207. JEPCO asserts that on 30 May 1990 the Power Cables Division of Felten & Guilleaume Energietechnik AG ("Felten") made a tender offer to supply 56 kilometres of "240 SQ. MM., 8.7/15KV, 3-core, XLPE - insulated, aluminium cable" to JEPCO at a total contract price of DEM 2,445,520. JEPCO accepted the tender offer on 20 September 1990. However, in a letter dated 9 October 1990 Felten rejected JEPCO's award of contract, advising that its board had passed a resolution that there be no deliveries to "the critical area", including Jordan.

(a) Emergency expenditure

208. On 1 October 1990, "in order to meet certain project completion deadlines", JEPCO purchased four kilometres of "screened 8,7/15 kv Alu. 1. 3 x 240 mm2 (sm)" cable from Hellenic Cables S.A. ("Hellenic") for a total price of USD 21,440 (JOD 14,183). It seeks compensation for this amount.

(b) Additional cost

209. JEPCO further asserts that in early 1992 it re-opened the tendering for the power cable to all of the original tender participants. On 4 August 1992, it awarded a contract to Alcatel Kabelmetal Electro GmbH ("Alcatel") for the supply of 54 kilometres of "240 SQ. MM. 8.7/15KV, 3-core XLPE insulated aluminium cable", and 18 kilometres of "240 SQ. MM. 8.7/15KV, 1-core XLPE insulated aluminium cable".

210. The total CIF (cost, insurance, freight) price under the contract with Alcatel was DEM 3,235,272. JEPCO seeks compensation for DEM 789,752, being the difference between the price under the contract with Felten and the price under the contract with Alcatel.

2. Analysis and valuation

(a) Emergency expenditure

211. The Panel finds that JEPCO did not provide sufficient evidence that the purchase of the four kilometres of cable in October 1990 was caused by Iraq's invasion and occupation of Kuwait. It provided no evidence that the four kilometres of cable was used on the same project for which the 56 kilometres had been ordered from Felten. It provided no evidence that the four kilometres of cable was delivered or paid for.

(b) Additional cost

212. The Panel finds that JEPCO did not provide sufficient evidence in support of its claim. JEPCO did not provide sufficient evidence that it concluded a contract with Felten in 1990. It provided a letter dated 20 September 1990 confirming "acceptance of part of your offer no. 3448 dated 30 May 1990", but it did not provide a copy of the tender offer. The Panel is unable to determine whether the letter of 20 September 1990 constitutes the acceptance of an offer, or a new offer that was rejected by Felten in its letter of 9 October 1990.

213. The Panel further finds that JEPCO's claim, in asserting an entitlement to the difference between the price under the contract with Felten and the price under the contract with Alcatel, does not explain the fact that the contract with Felten was for 56 kilometres of 3-core cable, and the contract with Alcatel was for a larger total quantity of cable, namely, 54 kilometres of 3-core cable, and 18 kilometres of 1-core cable.

214. The Panel further finds that JEPCO's calculation of the claimed amount does not take into account its statement in its response to the article 34 notification that it had received DEM 70,000 from Felten by forfeiting the bid bond enclosed in their offer of contract.

3. Recommendation

215. The Panel recommends no compensation for contract losses.

B. Business transaction or course of dealing

1. Facts and contentions

216. JEPCO seeks compensation in the amount of USD 983,480 (JOD 647,130) for decreased electricity revenues in the year beginning August 1990.

217. In August 1990 the Government of Jordan issued electricity conservation guidelines which ordered Jordanian electricity providers, including JEPCO, to take certain steps to reduce electricity consumption. JEPCO asserts that its estimated growth rate for the year beginning August 1990 was 5.9 per cent, however, due to decreased electricity consumption it was unable to obtain this. JEPCO asserts that had the 5.9 per cent growth

rate been met, its additional sales would have amounted to 53,000,000 kilowatt-hours ("kWh"), its profit on 1 kWh was 12.21 Jordanian fils, and therefore its lost revenue amounted to JOD 647,130.

2. Analysis and valuation

218. The Panel finds that JEPCO provided sufficient evidence to show that the Government of Jordan issued directives with a view to decreasing electricity consumption. However, while JEPCO provided a considerable amount of general documentation, the Panel finds that JEPCO did not provide sufficient evidence to enable the Panel to establish the quantum of the claimed loss with reasonable certainty.

219. The documents provided by JEPCO indicate that the growth rate for 1988 was 9.8 per cent, and the growth rate for 1989 was 4.5 per cent. JEPCO provided no evidence to explain the deterioration of the growth rate in 1989, prior to Iraq's invasion and occupation of Kuwait. JEPCO calculated its profit on 1 kWh of 12.21 Jordanian fils by deducting the cost of 1 kWh from the Jordan Electricity Authority (21.02) from the purchase price of 1 kWh to customers (33.23). However, it did not provide sufficient evidence that 12.21 Jordanian fils constitutes a net profit.

3. Recommendation

220. The Panel recommends no compensation for business transaction or course of dealing.

C. Summary of recommended compensation for JEPCO

221. Based on its findings regarding JEPCO's claim, the Panel recommends no compensation.

XI. THE CLAIM OF THE JORDANIAN ELECTRICAL & MECHANICAL ENGINEERING CO.

222. The Jordanian Electrical & Mechanical Engineering Co. ("JEME") is an entity existing under the laws of Jordan. On 10 January 1990, JEME entered into a contract with a Kuwaiti company, the National Company for Mechanical and Electrical Works Ltd. ("NCMEW") by which it agreed to perform mechanical and electrical works for Kuwait's new Embassy and Ambassador's residence complex in Sana'a, Yemen (the "Sana'a Contract"). JEME asserts that NCMEW suspended the contract on 22 August 1990 due to Iraq's invasion and occupation of Kuwait.

223. JEME seeks compensation in the total amount of USD 228,670 for overhead expenses, loss of profits, and claim preparation costs.

224. The claim preparation cost element is in the amount of USD 5,200. Applying the approach taken with respect to claim preparation costs set out in paragraph 60 of the Summary, the Panel makes no recommendation for claim preparation costs.

A. Loss or profits/overheads

1. Facts and contentions

225. JEME seeks compensation in the amount of USD 223,470 for (i) "expenses spent in Yemen" (USD 38,000); (ii) "overhead expenses" (USD 84,780); and (iii) "loss of the minimum net profit expected to be earned out of profit" (USD 100,690), in relation to the Sana'a Contract.

226. The Sana'a Contract was due to be completed by 10 April 1991. Work on the project was suspended on 22 August 1990 allegedly due to Iraq's invasion and occupation of Kuwait.

227. The "expenses spent in Yemen" were incurred between 7 February and 30 September 1990. They comprise the cost of setting up the site office, office furniture, the salary of the project manager, the accommodation of the project manager, car rental, water, electricity and fuel costs for the site office and accommodation, office secretary and office stationary, and a round trip airfare.

228. The "overhead expenses" were incurred in JEME's head office in Amman. JEME asserts that the Sana'a Contract amounted to 60 per cent of JEME's production capability. Accordingly, JEME attributes 60 per cent of the head office expenses incurred in Amman to the Sana'a Contract.

229. The "minimum net profit" is calculated as approximately 17 per cent of the total project value of USD 684,951. JEME asserts that this calculation was based on the personal experience of its General Manager "gained in the Yemeni market".

230. In its response to the article 34 notification, JEME stated that, in its opinion, the Sana'a Contract was not resumed after the cessation of

hostilities in Kuwait probably because: (a) the project did not have priority over reconstruction in Kuwait; and (b) because the diplomatic relationship between Kuwait and Yemen was suspended because of the support given by Yemen to Iraq during the crisis.

2. Analysis and valuation

231. With respect to losses suffered on projects located in Yemen, claimants must provide evidence that the losses were directly caused by Iraq's invasion and occupation of Kuwait, for example, because military operations elsewhere in the Middle East had a direct impact on the project in Yemen.

232. The Panel finds that JEME did not provide sufficient evidence that military operations elsewhere in the Middle East had a direct effect on the project located in Yemen. As suggested by JEME in its response to the article 34 notification, it appears to the Panel that the most likely explanation for the suspension of the Sana'a Contract, and the failure to resume it after the cessation of hostilities, was the decision of the Government of the State of Kuwait not to continue with the Sana'a Contract.

3. Recommendation

233. The Panel recommends no compensation for loss of profits/overheads.

B. Summary of recommended compensation for JEME

234. Based on its findings regarding JEME's claim, the Panel recommends no compensation.

XII. THE CLAIM OF ATLANTIC GULF & PACIFIC COMPANY OF MANILA, INC

235. Atlantic Gulf & Pacific Company of Manila, Inc. ("Atlantic") is a corporation existing under the law of the Philippines which operates as an engineering and manpower contractor in the Middle East. At the time of Iraq's invasion and occupation of Kuwait, Atlantic was performing manpower contracts in Kuwait and Iraq. Atlantic asserts that because of Iraq's invasion and occupation of Kuwait the contracts were interrupted.

236. Atlantic seeks compensation in the total amount of USD 288,817 for loss of profits, loss of tangible property, financial losses, and the expenses of demobilising a villa maintained for its manpower project in Kuwait.

A. Loss of profits

1. Facts and contentions

237. Atlantic seeks compensation in the amount of USD 228,984 (incorrectly stated as USD 228,944 in the "E" claim form) for "lost revenues" on four manpower contracts.

238. In the "E" claim form, Atlantic characterised these loss elements as contract losses, but the Panel finds that they are more accurately described as loss of profits.

(a) Safat Project, Kuwait

239. Atlantic seeks compensation in the amount of USD 44,497 for lost profits on its manpower contract for the Safat Project, Kuwait.

240. On 26 September 1989, Atlantic entered into an agreement with Cogelex Alsthom ("Cogelex"), a French corporation. Under the terms of the agreement, Atlantic agreed to provide services and manpower to Cogelex for the erection, commissioning and maintenance of electric power substations in Kuwait. Atlantic was required to supply personnel, at the rates stipulated in the contract, for a 24 month period commencing on 1 September 1989.

241. Atlantic asserts that as at 2 August 1990 there were 20 employees allocated to the Safat Project. Due to Iraq's invasion and occupation of Kuwait, all employees allocated to the Safat project were evacuated and the manpower contract was terminated. Atlantic claims for lost profits for the unperformed portion of the contract, namely, from 12 September 1990 (presumably the date of evacuation of the employees) to 31 August 1991.

(b) West Qurna Oil Field Project, Iraq

242. Atlantic seeks compensation in the amount of USD 2,469 (incorrectly stated as USD 2,429 in the "E" claim form) for lost profits on its manpower contract for the West Qurna Oil Field Project, Iraq.

243. On 1 April 1990, Atlantic entered into an agreement with Tecnologie Progetti Lavori S.p.A. ("TPL"), an Italian corporation. Under the terms of the agreement, Atlantic agreed to provide "supervision and utility personnel services" to TPL for the development of the West Qurna oil field in Iraq. Atlantic was required to supply personnel, at the rates stipulated in the contract, for the period 1 April 1990 to 31 October 1993.

244. Atlantic asserts that as at 2 August 1990, one employee was allocated to the West Qurna Oil Field Project. Due to Iraq's invasion and occupation of Kuwait, the employee was evacuated and the contract terminated. Atlantic claims for its lost profits for the unperformed portion of the contract, namely, from 12 October 1990 (presumably the date of evacuation of the employee) to 31 October 1993.

(c) TPL Branch Office Project, Iraq

245. Atlantic seeks compensation in the amount of USD 35,117 for lost profits on its manpower contract for TPL's branch office in Baghdad, Iraq.

246. On 1 April 1990, Atlantic entered into an agreement with TPL pursuant to which Atlantic agreed to provide "utility personnel services" for TPL's branch office in Baghdad, Iraq. Atlantic was required to supply personnel, at the rates stipulated in the contract, for the period 1 April 1990 to 31 October 1993.

247. Atlantic asserts that as at 2 August 1990, there were four employees allocated to the TPL Branch Office Project. Due to Iraq's invasion and occupation of Kuwait, the employees were evacuated and the contract terminated. Atlantic claims for its lost profits for the unperformed portion of the contract, namely, from various dates in September and October 1990 (presumably the dates of evacuation of the employees), to 31 October 1993.

(d) Al-Qaim Project, Iraq

248. Atlantic seeks compensation in the amount of USD 146,901 for lost profits on its manpower contract for the Al-Qaim Project, Iraq.

249. On 2 February 1990, Atlantic entered into an agreement with Spie Batignolles ("Spie"), a French corporation. Under the terms of the agreement, Atlantic agreed to provide Filipino workers for Spie's site at Al-Qaim. Atlantic was required to supply personnel, at the rates stipulated in the contract, for a 24 month period commencing 1 February 1990.

250. Atlantic asserts that as at 2 August 1990, there were 23 employees allocated to the Al-Qaim Project. Due to Iraq's invasion and occupation of Kuwait, the employees were evacuated and the contract terminated. Atlantic claims for its lost profits for the unperformed portion of the contract,

namely, from various dates in October and November 1990 (presumably the dates of evacuation of the employees) to 31 January 1992.

2. Analysis and valuation

251. The Panel finds that Atlantic had existing contractual relationships with Cogelex, TPL and Spie for the supply of manpower for various projects in Kuwait and Iraq. The Panel further finds that it is likely that the continuation of these contractual relationships was rendered impossible by Iraq's invasion and occupation of Kuwait.

252. However, Atlantic did not provide sufficient evidence that the four manpower contracts would have generated the profits claimed. Under the contract for the Safat Project, Cogelex could reduce the scope of work or defer the implementation of the work if this was required. Under the contracts for the West Qurna Oil Field Project and the TPL Branch Office Project, Atlantic was to provide personnel of "such number and qualification" as TPL may advise during the period of the contract. Under the contract for the Al-Qaim Project, Spie issued a "blanket order" for personnel taking into account Spie's own "mobilisation schedule...which will be updated from time to time".

253. Atlantic provided no evidence, in respect of the four contracts, that the number of personnel employed on the contracts as at 2 August 1990 would have remained constant for the period in respect of which Atlantic calculates its loss of profits.

254. The Panel also notes that Atlantic, in calculating its loss of profits, only made allowance for the wages payable by Atlantic to the workers. Atlantic provided no evidence of any other costs that it may have incurred in performing the manpower contracts, which may have affected the profitability of the contracts as a whole. Examples of such costs would be the overhead costs of its office in the Philippines, or the cost of insurance for the workers.

3. Recommendation

255. The Panel recommends no compensation for loss of profits.

B. Loss of tangible property

256. Atlantic seeks compensation in the amount of USD 13,830 (3,997 Kuwaiti dinars (KWD)) for loss of tangible property.

257. Atlantic asserts that, in order to complete the four manpower contracts described above, it maintained "vehicles and office equipments for the orderly administration of the ongoing projects".

258. It further asserts that, as a result of Iraq's invasion and occupation of Kuwait, it lost fixed assets with a net book value of KWD 3,997. Atlantic did not explain how the assets were lost, or where the

assets were located. It merely provides a list of fixed assets, including vehicles, a refrigerator, washing machines and television sets. The list states the "net book value" of each of the assets.

259. The Panel finds that the performance of Atlantic's manpower contracts may have required Atlantic to own the type of property for which it seeks compensation. However, the Panel finds that Atlantic did not provide sufficient evidence (a) that it owned the specific property claimed; (b) that the property was in Kuwait/Iraq at the time of Iraq's invasion and occupation of Kuwait; and (c) that the property was thereby lost.

260. The Panel recommends no compensation for loss of tangible property.

C. Financial losses

261. Atlantic seeks compensation in the amount of USD 26,522 (KWD 4,992 and USD 9,248) for the loss of the cash balances of four accounts maintained with the Gulf Bank, Kuwait.

262. In the "E" claim form, Atlantic characterised these loss elements as tangible property losses, but the Panel finds that they are more accurately described as financial losses.

263. The Panel finds that after the liberation of Kuwait, the Central Bank of Kuwait established procedures to provide claimants access to amounts on deposit with Kuwaiti banks. Atlantic provided correspondence dated between January and March 1992 in which it requested the Gulf Bank to close its four accounts and remit the balance in United States dollars to a Hong Kong bank account. However, despite a specific request for evidence from the secretariat, Atlantic provided no evidence that the Gulf Bank denied Atlantic access to its bank accounts.

264. The Panel recommends no compensation for financial losses.

D. Other - demobilisation expenses

265. Atlantic seeks compensation in the amount of USD 19,481 for the "final demobilisation" of Atlantic's Kuwait station at Villa Rowda.

266. In the "E" claim form, Atlantic characterised this loss element as "payment or relief to others", but the Panel finds that it is more accurately described as "other".

267. Atlantic engaged AGAP Arabia Ltd., a Saudi Arabian corporation, to send a representative to Kuwait to demobilise the Kuwait station "in order to limit and minimize [Atlantic's] contractual liabilities for the use of the villa". In October 1991 (some seven months after the liberation of Kuwait) AGAP Arabia Ltd. invoiced Atlantic for sums paid to the owner of the villa. These sums were for rental of the villa for five months, telephone bills for August 1990, and the cost of clearing broken property

and debris. AGAP Arabia Ltd. also invoiced Atlantic for the cost of the transport, food and hotel expenses of the representative who travelled from Saudi Arabia to Kuwait.

268. Save for the cost of clearing the villa of broken property and debris, the Panel finds that Atlantic did not provide sufficient evidence that the costs of demobilisation were directly caused by Iraq's invasion and occupation of Kuwait.

269. The Panel recommends compensation in the amount of USD 2,880 (SAR 10,784) for demobilisation expenses.

E. Summary of recommended compensation for Atlantic

270. The Panel recommends compensation in the amount of USD 2,880. The Panel finds the date of loss to be 2 August 1990.

XIII. THE CLAIM OF POLIMEX-CEKOP LTD.

271. Polimex-Cekop Ltd. ("Polimex") is a corporation existing under Polish law which provides manpower and technical services to a wide range of industries. It asserts that, at the time of Iraq's invasion and occupation of Kuwait, it had 18 contracts with various Iraqi state entities, and that these contracts were disrupted due to Iraq's invasion and occupation of Kuwait.

272. Polimex seeks compensation in the total amount of USD 51,683,454 for contract losses (in respect of all 18 contracts), loss of profits (in respect of four contracts), loss of tangible property (in respect of five contracts), evacuation costs (in respect of four contracts), and claim preparation costs.

273. The claim preparation cost element is in the amount of USD 1,514,599. Applying the approach taken with respect to claim preparation costs set out in paragraph 60 of the Summary, the Panel makes no recommendation for claim preparation costs.

A. Contract losses

274. Polimex seeks compensation in the amount of USD 16,887,035 for contract losses in respect of 18 contracts with Iraqi state agencies.

275. Polimex organised its claim in 18 separate volumes labelled Volume 2 to Volume 19. For ease of reference, the Panel refers to the claimant's volume number in this report.

276. In this section of the report the Panel considers whether Polimex has suffered a loss resulting directly from Iraq's invasion and occupation of Kuwait in respect of each of the 18 claims for contract losses. The Panel makes a final recommendation in respect of contract losses after considering the question of advance payments. This appears in section D, infra.

1. Volume 2 - Contract 10-280/0-1198 ("NASSR")

277. Polimex seeks compensation in the amount of USD 439,659 for unpaid invoices on Contract 10-280/0-1198. Polimex entered into the contract on 30 April 1990 with the NASSR Establishment for Mechanical Industries Taji-Baghdad ("NASSR"). The contract provided for the employment of 60 Polish specialists in the Free Forging Plant, Project Taji for a period of 12 months. The value of the contract was USD 1,015,323 and IQD 316,410. The specialists were evacuated from the plant in January 1991.

278. The Panel finds that NASSR is an agency of the State of Iraq. The Panel further finds that NASSR failed to pay invoices in the amount of USD 439,659 for work performed between May and December 1990.

279. The Panel finds that Polimex provided sufficient evidence in support of its losses. It provided a copy of the contract with NASSR, copies of the outstanding invoices approved by NASSR, and correspondence that shows that the invoices were still outstanding in 1992.

280. The Panel considers that Polimex has suffered a loss resulting directly from Iraq's invasion and occupation of Kuwait in the amount of USD 439,659 in respect of Contract 10-280/0-1198.

2. Volume 3 - Contract 10-800/2-0011 ("SCCIP")

281. Polimex seeks compensation in the amount of USD 907,402 for contract losses under Contract 10-800/2-0011. The claim is for unpaid invoices (USD 514,156), amount due on signing of preliminary acceptance certificate (USD 244,312), and amount due on signing of final acceptance certificate (USD 148,934). Polimex entered into the contract on 11 March 1982 with the State Contracting Company for Industrial Projects ("SCCIP"). The contract provided for the construction of a railway system in Umm Qasr. The value of the contract was USD 3,090,775.

282. Polimex asserts that the works were finished in September 1989, the guarantee period began on 1 October 1989, the preliminary acceptance certificate was signed on 5 June 1990, and the final acceptance certificate was due to be signed in late 1990.

283. The Panel finds that SCCIP is an agency of the State of Iraq.

284. The Panel finds that the unpaid invoices relate to work that was performed prior to 2 May 1990. The claim is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation for the unpaid invoices.

285. The Panel finds that the preliminary acceptance certificate was issued in September 1989, not on 5 June 1990, as asserted by Polimex in its statement of claim. Accordingly, the amount due on the signing of the preliminary acceptance certificate is a debt which arose prior to 2 May 1990 and is outside the jurisdiction of the Commission. The Panel recommends no compensation for this portion of the claim.

286. The Panel finds that the amount due on the signing of the final acceptance certificate was due in October 1990. The Panel finds that Polimex provided sufficient evidence that the amount of USD 148,934 was not paid due to Iraq's invasion and occupation of Kuwait.

287. The Panel considers that Polimex has suffered a loss resulting directly from Iraq's invasion and occupation of Kuwait in the amount of USD 148,934 in respect of Contract 10-800/2-0011.

3. Volumes 4 - 10 Contracts 10-222/1-0023, 24, 25, 26, 27, 28, 30 ("SPENA")

288. Polimex seeks compensation in the amount of USD 189,015 for unpaid retention money withheld under seven contracts entered into with the State Poultry Establishment Northern Area ("SPENA"). The contracts provided for the construction of poultry farms. All seven contracts were entered into on 15 July 1981 and were completed in March 1986.

289. The Panel finds that the retention money withheld under all seven contracts was due and payable prior to 2 May 1990. The claim is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation.

290. The Panel recommends no compensation for Contracts 10-222/1-0023, 24, 25, 26, 27, 28 and 30.

4. Volume 11 - Contract 10-430/5-0206 ("SCCIP")

291. Polimex seeks compensation in the amount of USD 475,979 for "unsettled payments in respect of provisional invoices for work in progress, amounts due in respect of PAC, maintenance and FAC" on Contract 10-430/5-0206. Polimex entered into the contract on 23 December 1985 with the State Contracting Company for Industrial Projects ("SCCIP"). The contract provided for the construction of a grain silo at Umm Qasr. The value of the contract was USD 5,481,213. Polimex asserts that the construction of the silo was finished on 9 October 1989.

292. The Panel finds that Polimex did not provide sufficient information or evidence to enable the Panel to adequately assess the claim. There appear to be four components of the claim: (i) outstanding invoices in respect of work in progress; (ii) outstanding invoices in respect of maintenance; (iii) amount due on signing of provisional acceptance certificate; and (iv) amount due on signing of final acceptance certificate. However, the Panel has been unable to determine, firstly, the amount attributable to each component, and, secondly, whether the debt arose before or after 2 May 1990.

293. The Panel recommends no compensation for Contract 10-430/5-0206.

5. Volume 12 - Contract 10-280/0-1251 ("CCSE")

294. Polimex seeks compensation in the amount of USD 269,385 for what it terms "unpaid invoices" on Contract 10-280/0-1251. Polimex entered into the contract on 11 June 1990 with the Central Cement State Enterprise ("CCSE"). The contract provided for the supply of technical assistance by

six Polish specialists at the Falluja cement plant for a period of one year. The value of the contract was USD 298,000. The specialists were evacuated from Iraq in October 1990.

295. The documentation submitted in support of the claim demonstrates that the claim for "unpaid invoices" comprises two parts, as follows: (i) the outstanding United States dollar amounts on four invoices for work performed between June and October 1990 (USD 22,037); and (ii) the loss of profits on the work which Polimex would have performed between October 1990 and June 1991, had the contract not been interrupted by Iraq's invasion and occupation of Kuwait.

296. The Panel finds that Polimex did not provide sufficient evidence in support of its claim for the outstanding amounts in relation to work performed between June and October 1990. It only provided a copy of the contract and a letter dated 9 May 1992 from CCSE to Polimex stating that the total amount of USD 22,037 had not been transferred to Polimex. Polimex did not provide copies of the invoices or evidence of the work performed.

297. The Panel finds that Polimex did not provide sufficient evidence to support its claim for loss of profits in respect of work performed between October 1990 and June 1991. It provided only the contract and the letter referred to in the previous paragraph.

298. The Panel recommends no compensation for Contract 10-280/0-1251.

6. Volume 13 - Contract 10-280/9-0951 ("SEIS")

299. Polimex seeks compensation in the amount of USD 239,168 for what it terms "unpaid invoices" on Contract 10-280/9-0951. Polimex entered into the contract on 19 October 1989 with the State Enterprise for Iron and Steel ("SEIS"). The contract provided for the delivery and erection of steel structures for a steelworks in Basrah. The value of the contract was USD 34,235,000.

300. Polimex asserts that the first six months of the contract (January to June 1990) was a "preliminary period for familiarisation with technical documentation, ordering materials, making equipment, starting production of the structure elements etc". The claim for "unpaid invoices" relates to this six month period. However, Polimex provided no information, apart from that contained in the contract, concerning the date, amount, or nature of the work included in the invoices.

301. The Panel is unable to recommend compensation in respect of the "unpaid invoices". There is evidence that Polimex entered into the contract with SEIS in October 1989. There is also evidence that Polimex performed work during the "preliminary period" of the contract. This is in the form of invoices in respect of paint purchased from a Dutch company

(although there is no proof that the paint was used for this project), and import customs declarations confirming importation into Iraq between March and October 1990 of camp equipment, vehicles and steel structure elements for the client SEIS. However, Polimex did not provide copies of the relevant invoices and it is not possible to discern the portion of the work that was performed after 2 May 1990.

302. The Panel recommends no compensation for Contract 10-280/9-0951.

7. Volume 14 - Contract 10-280/0-1109 ("AMCC")

303. Polimex seeks compensation in the amount of USD 47,750 for unpaid invoices for work performed in the period May to July 1990 on Contract 10-280/0-1109. Polimex entered into the contract on 13 February 1990 with Al-Mansour Contracting Co. ("AMCC"). The contract provided for the construction of a silo production line. The value of the contract was USD 175,500. Polimex asserts that it fully discharged its contractual obligations.

304. The Panel finds that AMCC is an agency of the State of Iraq. The Panel further finds that AMCC has not paid invoices for work performed between May and July 1990. However, the documentation provided by Polimex refers to conflicting amounts as owing under the invoices. The Panel finds that the amount owing under the invoices is USD 28,600, the amount stated in a payment order dated 2 September 1990 from AMCC to the Central Bank of Iraq.

305. The Panel considers that Polimex has suffered a loss resulting directly from Iraq's invasion and occupation of Kuwait in the amount of USD 28,600 in respect of Contract 10-280/0-1109.

8. Volume 15 - Contract 10-287/9-0727 ("FAO")

306. Polimex seeks compensation in the amount of USD 763,447 for unpaid invoices, numbers 13 to 19, for work performed in the period April to October 1990 on Contract 10-287/9-0727. Polimex entered into the contract on 11 March 1989 with FAO State Establishment ("FAO"). The contract provided for the assignment of 139 Polish specialists to Iraq for a period of six months. The value of the contract was USD 5,001,498.

307. The Panel finds that FAO is an agency of the State of Iraq.

308. The Panel finds that the work included in invoice No. 13 was performed in April 1990. The claim in respect of this amount, i.e., USD 157,762 is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation.

309. The Panel finds that the work included in invoice nos. 14-19 was performed after 2 May 1990. However, the documentation provided by Polimex refers to conflicting amounts as owing under the invoices. The Panel finds that the amount owing under the invoices is USD 575,543, the amount described as outstanding in a letter dated 23 March 1990 from FAO to Polimex.

310. The Panel considers that Polimex has suffered a loss resulting directly from Iraq's invasion and occupation of Kuwait in the amount of USD 575,543 in respect of Contract 10-287/9-0727.

9. Volume 16 - Contract 10-280/0-1245 ("Bader")

311. Polimex seeks compensation in the amount of USD 10,230,000 for what it terms "unpaid invoices" on Contract 10-280/0-1245. Polimex entered into the contract on 12 June 1990 with Bader State Establishment ("Bader"). The contract provided for the design and manufacture of steel structures. The value of the contract was USD 10,230,000 and IQD 165,000.

312. The Panel is unable to recommend compensation for the "unpaid invoices". Polimex provided evidence that it entered into a contract with Bader and that Polimex granted an advance payment guarantee to Bader. However, Polimex did not provide copies of invoices totalling USD 10,230,000, or evidence of work performed.

313. The Panel recommends no compensation for Contract 10-280/0-1245.

10. Volume 17 - Contract 10-430/7-0343/1 ("FAO")

314. Polimex seeks compensation in the amount of USD 2,605,343 for unpaid invoices on Contract 10-430/7-0343/1. Polimex entered into the contract on 22 April 1989 with FAO. The contract provided for the employment of Polish specialists on various FAO projects. Polimex did not state the total value of the contract. Polimex asserts that the specialists were evacuated from Iraq in December 1990.

315. The Panel finds that FAO has not paid invoices in the amount of USD 827,325 for work performed after 2 May 1990.

316. The Panel finds that Polimex provided sufficient evidence in support of its losses. It provided a copy of the contract with FAO, copies of the outstanding invoices approved by FAO, and correspondence that shows that the invoices were still outstanding in 1992.

317. The Panel considers that Polimex has suffered a loss resulting directly from Iraq's invasion and occupation of Kuwait in the amount of USD 827,325 in respect of Contract 10-430/7-0343/1.

11. Volume 18 - Contract 10-280/9-0892 ("SEIDACC")

318. Polimex seeks compensation in the amount of USD 659,843 for unpaid invoices on Contract 10-280/9-0892. Polimex entered into the contract on 8 July 1989 with the State Engineering Co. for Industrial Design and Construction ("SEIDACC"). The contract provided for installation and mechanical erection services to be carried out over a period of six months on a Granulation (Fertiliser) Plant at Al-Qaim. The total value of the contract was USD 2,700,000. Polimex asserts that the specialists were evacuated from Iraq in September 1990.

319. The Panel finds that SEIDACC is an agency of the State of Iraq.

320. The Panel finds that unpaid invoices totalling USD 269,118 relate to work that was performed prior to 2 May 1990. The claim is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation for this amount.

321. The Panel further finds that SEIDACC has not paid invoices in the amount of USD 390,725 for work performed after 2 May 1990. The Panel finds that Polimex provided sufficient evidence in support of those losses. It provided a copy of the contract with SEIDACC, copies of the outstanding invoices approved by SEIDACC, and correspondence that shows that the invoices were still outstanding in 1992.

322. The Panel considers that Polimex has suffered a loss resulting directly from Iraq's invasion and occupation of Kuwait in the amount of USD 390,725 in respect of Contract 10-280/9-0892.

12. Volume 19 - Contract 10-280/0-1272 ("SEIDACC")

323. Polimex seeks compensation in the amount of USD 60,044 for unpaid invoices on Contract 10-280/0-1272. Polimex entered into the contract on 29 May 1990 with SEIDACC. The contract provided for the supply of Polish specialists for the assembly of a paint shop in Fallujah. The value of the contract was USD 120,500. The contract was completed in October 1990.

324. The Panel finds that SEIDACC has not paid invoices in the amount of USD 60,044 for work performed after 2 May 1990.

325. The Panel finds that Polimex provided sufficient evidence in support of its losses. It provided a copy of the contract with SEIDACC, and copies of the outstanding invoices approved by SEIDACC.

326. The Panel considers that Polimex has suffered a loss resulting directly from Iraq's invasion and occupation of Kuwait in the amount of USD 60,044 in respect of Contract 10-280/0-1272.

B. Loss of profits

327. Polimex seeks compensation in the amount of USD 30,334,846 for loss of earnings on four of the 18 contracts on which it was working in Iraq.

1. Volume 2 - Contract 10-280/0-1198 ("NASSR")

328. Polimex seeks compensation in the amount of USD 1,151,206 for the loss of earnings on Contract 10-280/0-1198 (see paragraphs 277 to 280, supra).

329. Polimex asserts that, at the time the Polish specialists were evacuated, there were still works to be discharged on the contract in the amount of USD 572,602 and IQD 179,378. Using the exchange rate 1 IQD = 3.208889, Polimex states that the "value of the work which could not be continued" because of the war is equal to USD 1,151,206.

330. The Panel finds that Polimex did not provide sufficient evidence to enable the Panel to calculate the net loss of profits on this contract. Polimex claimed for the balance of possible gross earnings under the contract. It did not calculate the net loss of profits, nor did it provide sufficient evidence to enable the Panel to make the calculation.

331. The Panel recommends no compensation for loss of profits on Contract 10-280/0-1198.

2. Volume 13 - Contract 10-280/9-0951 ("SEIS")

332. Polimex seeks compensation in the amount of USD 28,652,539 for the loss of earnings on Contract 10-280/9-0951 (see paragraphs 299 to 302, supra).

333. Polimex provided little information in support of its claim. It merely states that the "Iraqi invasion of Kuwait on August 2, 1990 made it impossible for the parties to implement the contract. Military operations prevented Polimex-Cekop Ltd from discharging further services, especially shipment of the fabricated structures stored in the Polish port or their erection in Iraq".

334. Polimex did not state how the claimed amount was calculated. The only other figures provided are the total estimated value of the contract (USD 34,235,000) and the total advance payments made (USD 4,671,312).

335. The Panel finds that Polimex did not provide sufficient evidence to enable the Panel to calculate the net loss of profits on this contract. Polimex did not state how the claimed amount was calculated. It provided no evidence relating to the costs of the contract. The only evidence concerning profitability is a general statement that the average profitability over a 20 year period was 35 per cent. The Iraqi branch accounts show that losses of IQD 2,259,601 were incurred on the contract,

but Polimex provided neither a breakdown of the costs or evidence that the sums have been paid.

336. The Panel recommends no compensation for loss of profits on Contract 10-280/9-0951.

3. Volume 15 - Contract 10-287/9-0727 ("FAO")

337. Polimex seeks compensation in the amount of USD 234,600 for the loss of earnings on Contract 10-287/9-0727 (see paragraphs 306 to 310, supra).

338. Polimex provided little information in support of its claim. It merely states that "the necessity of evacuating the staff from the war zone made it impossible to discharge all the works in accordance with the contract. At the moment when the Iraqi authorities, as a result of intervention of Polish authorities, issued exit visas for the Polish specialists, the contractual works were discharged in 95.8 per cent. The value of works not yet discharged amounted to USD 234,600."

339. The Panel finds that Polimex did not provide sufficient evidence to enable the Panel to calculate the net loss of profits on this contract. Polimex claimed for the balance of possible gross earnings under the contract. It did not calculate the net loss of profits, nor did it provide sufficient evidence to enable the Panel to make the calculation.

340. The Panel recommends no compensation for loss of profits on Contract 10-287/9-0727.

4. Volume 17 - Contract 10-430/7-0343/1 ("FAO")

341. Polimex seeks compensation in the amount of USD 296,501 for the loss of earnings on Contract 10-430/7-0343/1 (see paragraphs 314 to 317, supra).

342. Polimex provided little information in support of its claim. It merely states that "... as a result of the outbreak of the war and connected with it danger for people in the war zone, it was impossible to continue the implementation of the contract. This situation deprived Polimex-Cekop Ltd of earnings in the amount of USD 296,501.34 which was a difference between the value of the contract which was to be executed till the end of February 1991, and the value which was executed till the end of November 1990."

343. The Panel finds that Polimex did not provide sufficient evidence to enable the Panel to calculate the net loss of profits on this contract. The claim appears to be for possible gross earnings under the contract. Polimex did not specify the contract sum. No other calculations are provided to support the claim.

344. The Panel recommends no compensation for loss of profits on Contract 10-430/7-0343/1.

C. Loss of tangible property

1. Facts and contentions

345. Polimex seeks compensation in the amount of USD 2,554,929 for the loss of tangible property related to five of the 18 contracts that Polimex had with Iraqi state agencies.

346. In this section of the report the Panel considers the five claims for loss of tangible property, and makes a preliminary recommendation for compensation (see paragraph 354, infra). The Panel makes a final recommendation in respect of tangible property losses after it has considered the question of advance payments. This appears in paragraph 359, infra.

347. Polimex states that most of its property was located at three camps: the first "in the suburbs of Baghdad, on the road to Baquba"; the second at the Ten Berth Project in Umm Qasr; and the third at the Ashtar Steel Plant in Khoral Zubair.

348. Polimex asserts that when its workers were evacuated towards the end of 1990, it employed a guard to patrol the camps and protect the property left behind. However, despite its best efforts the property was "stolen or destroyed".

349. In its response to the article 34 notification, Polimex provided the following further information about how the property was lost:

a. The site in the suburbs of Baghdad "was the scene of thefts during the war in the Gulf";

b. The other two camps were "taken over during the war either by the army or by Al Fao Establishment, without any confiscation documents being issued on that account";

c. "The final confiscation of the assets of foreign companies operating in Iraq took place in 1992, pursuant to the President of Iraq's decree of April 16, 1992"

350. The name of the contract, the location of the contract site, the description of the property, the information provided by Polimex concerning how the property was lost, and the amount of the claim, in relation to each of the five contracts, is included in table 3, infra.

Table 3. Polimex' claim for loss of tangible property

Contract	Contract site	Description of property	Means of loss	Amount of claim
Volume 2 10-280/0-1198	Free forging plant, Taji	TV set, tape recorder, "Kasetka NA Pieniadze", Pic Up Nissan, Nissan bluebird, etc.	"stolen and destroyed"	USD 6,905
Volume 3 10-800/2-0011	Railway system, Umm Qasr	51 items including vehicles, concrete mixers, construction equipment, airconditioners, etc. 3 items - Nissan bus, Nissan pick-up, deep freezer	"stolen and destroyed" "confiscated by the Iraqi authorities"	IQD 535,488 (converted by Polimex to USD 1,724,272) IQD 30,670 (converted by Polimex to USD 98,757)
Volume 11 10-430/5-0206	Grain silo, Umm Qasr	Approx. 70 items of property including vehicles, welding machines, generators, refrigerators	"stolen or destroyed"	USD 16,896
Volume 13 10-280/9-0951	Steelworks, Basra	Approx. 40 items of property including camp equipment, vehicles, video recorders	Not stated	IQD 208,690 (converted by Polimex to USD 671,982)
Volume 17 10-430/7-0343/1	Various FAO projects (no further information provided)	Approx. 350 items of equipment including vehicles, welders, heaters, caravans, etc.	"stolen and destroyed"	USD 36,117

2. Analysis and valuation

351. On the evidence provided by Polimex, the Panel is satisfied that: (a) property owned by Polimex was being used in Iraq as at August 1990 on various contracts which Polimex had entered into with various Iraqi state agencies; (b) at least some of this property was stolen or damaged between 2 August 1990 and the first part of 1991; (c) the Umm Qasr camp was looted and destroyed in March 1991; and (d) other property was confiscated by the Iraqi authorities in 1992.

352. However, the Panel finds that Polimex did not clearly indicate which items of property were stolen, which were damaged, and which were confiscated.

353. The Panel finds that Polimex provided sufficient evidence that: (a) it owned the specific property claimed; (b) the property was in Iraq at the time of Iraq's invasion and occupation of Kuwait; and (c) in respect of some of the property claimed on Contract 10-800/2-0011 (Vol. 3) and the property claimed on Contract 10-280/9-0951 (Vol. 13) only, the property was lost as a direct result of Iraq's invasion and occupation of Kuwait. The Panel values this property at USD 392,804 (IQD 122,162) in respect of Contract 10-800/2-0011 (Vol. 3), and USD 671,029 (IQD 208,690) in respect of Contract 10-280/9-0951 (Vol. 13).

354. The Panel considers that Polimex has suffered a loss resulting directly from Iraq's invasion and occupation of Kuwait in the amount of USD 1,063,833 (IQD 330,852).

D. Advance payments

1. Facts and contentions

355. In its procedural order dated 7 December 1999, the Panel requested Polimex, in respect of each of the 18 contracts for which it seeks compensation for contract losses, to provide evidence of (a) any advance payments received by Polimex; and (b) whether Polimex retains any such advance payment or has repaid it to the Iraqi employer.

356. On 20 December 1999 Polimex responded that it had received an advance payment only with respect to Contract No. 10-280/9-0951 (Vol. 13). The value of the advance payment which it still retains is USD 3,736,961.

2. Analysis and valuation

357. Applying the approach with respect to advance payments set out in paragraphs 64 to 67 of the Summary, the Panel finds that Polimex must account for the advance payment in reduction of its claim. Given that the purpose of the advance payment in this case was also to purchase tangible property, the Panel finds that the advance payment must also be accounted for in any tangible property claim made by the claimant.

358. Accordingly, the Panel finds that the contract losses and tangible property losses incurred by Polimex in respect of the 18 manpower contracts equal the direct contract losses (USD 2,470,830) plus the direct tangible property losses (USD 1,063,833) less the advance payment still retained by Polimex (USD 3,736,961). As this calculation produces a negative figure, the Panel is unable to recommend compensation for contract losses or loss of tangible property.

3. Final recommendation for contract losses and loss of tangible property

359. The Panel recommends no compensation for contract losses and loss of tangible property.

E. Payment or relief to others

1. Facts and contentions

360. Polimex seeks compensation in the amount of USD 392,045 (3,682,238,428 Polish zloties (PLZ) and USD 5,574) for the costs of evacuating workers on four of the 18 contracts on which Polimex was working in Iraq.

361. The name of the contract, the employer, the liability for the airfare of the workers, the number of evacuees, and the amount of the claim is set out in table 4, infra.

Table 4. Polimex' claim for payment or relief to others

Contract	Employer	Liability for airfare	No. of evacuees	Amount (PLZ)
Volume 2 Contract 10-280/0-1198	NASSR Establishment for Mechanical Industries Taji-Baghdad	Under terms of contract NASSR responsible for "air tickets for route Warsaw - Baghdad - Warsaw" for Polimex staff	3	22,433,820
Volume 3 Contract 10-800/2-0011	State Contracting Company for Industrial Projects	According to statement of claim "under the agreement the travel costs of the Polish workers were to be settled by the Iraqi party"	64	463,103,314
Volume 17 Contract 10-430/7-0343/1	FAO State Establishment	Under terms of contract FAO responsible for "air tickets for route Warsaw - Baghdad - Warsaw" for Polimex staff	Not stated	3,144,367,194
Volume 19 Contract 10-280/0-1272	State Engineering Co. for Industrial Design and Construction	Under terms of contract SEIDACC responsible for "air tickets to and from Iraq" for Polimex employees	7	52,334,100

362. In respect of Contract 10-800/2-0011 (Vol. 3) Polimex also seeks compensation for (a) accommodation in Amman for two persons (USD 100), (b) costs of "approaching to Jordan" for two employees (USD 161), and (c) hiring of additional watchmen (USD 5,313).

2. Analysis and valuation

363. The Panel finds that Polimex provided sufficient evidence to support its claim for the airfares. It provided passenger manifests from Polish Airlines, debit notes from the Polish "Ministry of Economic Cooperation

With Abroad" for charter flights from Baghdad to Warsaw for various dates between August 1990 and May 1991, and receipts for the claimed amounts of the airfares.

364. The Panel finds that in the ordinary course of events the Iraqi employer would have borne the cost of returning the workers to Poland upon completion of the contract. Accordingly, the airfares constitute an additional cost that Polimex would not have incurred upon natural completion of the contract.

365. The Panel finds that Polimex did not provide sufficient evidence to support the three additional claims made on Contract 10-800/2-0011 (Vol. 3). In respect of items (a) and (b) (accommodation in Amman for two persons and costs of "approaching to Jordan" for two employees), Polimex provided an invoice for local evacuation costs, and an untranslated document. It did not explain how these documents relate to its claim.

366. In respect of item (c) (hiring of additional watchmen), the Panel finds that Polimex did not provide sufficient evidence to enable the Panel to determine whether the cost was directly due to Iraq's invasion and occupation of Kuwait. The only evidence is an agreement which could be terminated at any time by Polimex. There is no evidence of payment to the watchman.

3. Recommendation

367. The Panel recommends compensation in the amount of USD 395,514 (PLZ 3,682,238,428) for payment or relief to others.

F. Summary of recommended compensation for Polimex

368. Based on its findings regarding Polimex's claim, the Panel recommends compensation in the amount of USD 395,514. The Panel finds the date of loss to be 2 August 1990.

XIV. THE CLAIM OF BECHTEL LIMITED

369. Bechtel Limited ("Bechtel"), a company incorporated in the United Kingdom, is a wholly owned subsidiary of Bechtel Group Inc., an international construction company based in San Francisco.

370. On 28 October 1989, Bechtel entered into a Technical Services Agreement (the "TSA") with the Technical Corps for Special Projects, Ministry of Industry, Iraq ("Techcorp"). The agreement provided for the provision of engineering, financing, procurement, project management, construction and other related services in relation to the PC-2 Project - a large petrochemicals production facility located 60 kilometres from Baghdad, Iraq.

371. Bechtel seeks compensation in the total amount of USD 10,013,427 (5,162,993 Pounds sterling (GBP)) for unpaid amounts under the TSA, loss of profits, payment and relief to others, finance costs and interest. The total amount of Bechtel's alleged losses on the PC-2 Project is USD 12,013,427 (GBP 6,319,063). However, in presenting its claim, Bechtel deducted the amount of GBP 1,156,069 from from the gross amount of its alleged losses to account for the amount of USD 2,000,000 recovered from its insurers in respect of some of its losses.

372. For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to Bechtel's claim for interest.

A. Contract losses

1. Facts and contentions

373. Bechtel seeks compensation in the amount of USD 3,034,465 (GBP 1,596,128) for contract losses. The claim is for unpaid amounts invoiced to Techcorp under the TSA.

374. Bechtel and Techcorp entered into the TSA when, during the course of another Technical Services Agreement dated 20 July 1988 between Techcorp and Overseas Bechtel Inc., (another wholly-owned subsidiary of Bechtel Group Inc.), Techcorp indicated its wish to take advantage of an international credit facility of up to GBP 100,000,000 supported by the Export Credits Guarantee Department ("ECGD"). The ECGD is a United Kingdom Government credit agency that provides financial support for international trade transactions. In order to take advantage of this credit facility, Techcorp wished to enter into a contract with a Bechtel entity registered in the United Kingdom.

375. Bechtel states that it commenced providing services under the TSA after 27 April 1990. On 6 June 1990, it presented Techcorp with its first invoice for the supply of services up to 13 May 1990. The amount of the invoice was GBP 253,552. According to Bechtel, this was the only invoice that was paid by Techcorp.

376. Bechtel states that it continued to provide services to Techcorp up to 2 August 1990. It ceased all work on the PC-2 Project on this date. However, it continued to incur overhead costs until October 1990. Bechtel subsequently submitted to Techcorp further invoices for services rendered and overhead costs totalling GBP 1,596,128. However, although the outstanding invoices were never disputed by Techcorp, the "invoices were not formally approved by Techcorp ... and no payment has been received".

377. According to Bechtel, Techcorp refused to approve the outstanding invoices, "which prevented Bechtel from presenting the invoices against the appropriate credit facility". Approval of the invoices by Techcorp was a condition for payment under the appropriate credit facility.

378. The TSA provided for Techcorp to make an advance payment to Bechtel in the sum of GBP 588,235 within a specific time period. However, in response to a request for additional information made by the Panel, Bechtel stated that Techcorp was not able to secure the prerequisite letter of credit as set forth in the TSA and no advance payment was made to Bechtel.

2. Analysis and valuation

379. The Panel finds that Techcorp is an agency of the State of Iraq.

380. The supporting documentation provided by Bechtel indicates that the performance that created the debts in question occurred between May and August 1990 (in the case of services rendered) and between May and October 1990 (in the case of overhead costs). Accordingly, applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the contract losses relate to work performed subsequent to 2 May 1990 and are, therefore, compensable in their entirety. From the documentation provided by Bechtel, the Panel was able to identify the value of the work performed and recommends compensation in the amount of USD 3,034,465.

3. Recommendation

381. The Panel recommends compensation in the amount of USD 3,034,465 for contract losses.

B. Loss of profits

1. Facts and contentions

382. Bechtel seeks compensation in the amount of USD 4,121,064 (GBP 2,167,680) for loss of profits. The claim is for loss of anticipated profits (i.e., profits expected to be earned during the period 2 August 1990 to 22 July 1991) resulting from the early termination of the TSA. In its Statement of Claim, Bechtel states that 22 July 1991 was "the period anticipated to be covered by the [TSA]".

383. The amount claimed is based on the calculation of average payroll values prior to 2 August 1990 using the multipliers and additives set forth in the TSA.

2. Analysis and valuation

384. In support of its claim, Bechtel provided a schedule of loss of profits. The schedule sets out the total charges and "multiplier values" for its United Kingdom employees in relation to "home office", "project office" and "project site" for the six fortnightly pay periods between 13 May and 22 July 1990. In response to a request for further information, Bechtel stated that it had been unable to locate financial statements or balance sheets relevant to its operations in Iraq. The Panel finds that Bechtel failed to justify the calculation of the claimed figure and also failed to demonstrate that its work under the TSA would have been profitable as a whole.

385. The Panel finds that Bechtel failed to fulfil the evidentiary standard for loss of profits claims set out in paragraphs 125 to 131 of the Summary. Accordingly, the Panel recommends no compensation.

3. Recommendation

386. The Panel recommends no compensation for loss of profits.

C. Payment and relief to others

1. Facts and contentions

387. Bechtel seeks compensation in the amount of USD 3,458,869 (GBP 1,819,365) for payment or relief to others. The claim is for the costs of salaries and other benefits paid to its United Kingdom employees between August 1990 and March 1991. Bechtel states that "during the illegal detention of its employees in Iraq, Bechtel continued to pay their remuneration and other contractual benefits, including payroll, vacation pay-off and other expenditure totalling GBP 1,819,365".

388. Although more than 100 Bechtel group employees were detained in Iraq before being evacuated between 2 August and 11 December 1990, only 88 of those detained individuals were Bechtel employees assigned to the PC-2 Project. The claim by Bechtel relates to those 88 employees only.

389. Bechtel provided a statement, dated 6 February 1992, by an employee, who was the senior representative of the Bechtel group of companies in Iraq during the period of detention of Bechtel's staff. The statement contains an account of the circumstances of the detention of Bechtel's staff. A list of employees and their dependants who were in Iraq as at 2 August 1990 is attached to the statement.

390. The statement indicates that extensive repatriation of Bechtel's employees from Iraq had taken place by 8 December 1990. On 10 December

1990, the remaining United Kingdom employees left Baghdad. The author of the statement was the last of the employees to depart Iraq on 11 December 1990.

2. Analysis and valuation

391. The Panel finds that the salary costs of Bechtel's employees are compensable in principle. However, given that the last Bechtel employee departed Iraq on 11 December 1990, it is unclear to the Panel why Bechtel is claiming for salary costs and special allowances to March 1991 (inclusive). The Panel finds that the salary costs claimed for the months of January to March 1991 (inclusive) were not incurred as a direct result of Iraq's invasion and occupation of Kuwait and are not compensable. The Panel further finds that an adjustment of the December 1990 payroll should be made to reflect the extensive repatriation of Bechtel's employees that had taken place prior to 8 December 1990. After making this adjustment, the Panel recommends compensation in the amount of GBP 1,077,048.

3. Recommendation

392. The Panel recommends compensation in the amount of USD 2,047,620 (GBP 1,077,048) for payment and relief to others.

D. Finance costs

393. Bechtel seeks compensation in the amount of USD 1,399,029 (GBP 735,889) for finance costs. The claim is for premium costs in relation to financial assistance provided by the ECGD (GBP 720,589) and advance payment guarantee costs (GBP 15,300).

(a) ECGD premium costs

394. Bechtel states that, in November 1989, Bechtel, in conjunction with Techcorp, applied to the ECGD for financial assistance to support the PC-2 Project. After negotiations with the Midland Bank, on behalf of the ECGD, credit facilities were made available to Rafidain Bank. The amount of the finance charge was agreed at GBP 1,235,294.

395. According to Bechtel, Techcorp considered the fee of GBP 1,235,294 too high and counter-proposed an amount of GBP 720,589. The management of Bechtel decided to accept Techcorp's counter-proposal. Bechtel alleges that Techcorp agreed to reimburse it the amount of GBP 720,589 as part of the reimbursable costs under the TSA. However, this amount was never reimbursed.

396. The Panel finds that Bechtel failed to establish the direct link between its stated loss and Iraq's invasion and occupation of Kuwait. The finance charge was akin to an insurance premium paid under the credit risk guarantee cover. The Panel finds that the finance charge was an amount that a contractor would ordinarily expect to expend whether or not

recompense was received under the relevant insurance cover. Moreover, the Panel finds that, although Bechtel provided evidence that it sought Techcorp's formal agreement to reimburse the amount claimed under the TSA, it did not demonstrate that Techcorp actually agreed to do so.

397. The Panel recommends no compensation for ECGD premium costs.

(b) Advance payment guarantee costs

398. Bechtel states that, in accordance with the terms of the TSA, it "arranged for an advance payment guarantee to be issued by Rafidain Bank to Techcorp in the sum of GBP 588,235, being 5 per cent of the eligible value (as defined in the TSA) to guarantee the performance of Bechtel under the TSA". Bechtel alleges that it incurred correspondence charges to Barclays Bank Plc in the amount of GBP 15,300 for the provision of this guarantee.

399. In its response to the Panel's request for additional information made by the Panel, Bechtel states that it did not receive the advance payment under the TSA.

400. In support of its claim, Bechtel provided an invoice dated 23 July 1990 from Barclays Bank Plc for the claimed amount. However, Bechtel provided no evidence that it paid the amount invoiced. Accordingly, the Panel recommends no compensation for advance payment guarantee costs.

Recommendation

401. The Panel recommends no compensation for finance costs.

E. Bechtel's insurance recovery

402. Bechtel states that, in conjunction with other Bechtel group companies, it sought to recover some of its losses under the Bechtel group insurance policies. A total amount of USD 6,959,349 was recovered in respect of all of the Bechtel group's losses. Bechtel states that, of this amount, the sum of USD 2,000,000 was allocated to it.

403. Bechtel provided a statement dated 10 February 1994 made by the Risk Management Supervisor of the Bechtel Group Inc. The statement confirms that, of the total amount paid out to the various Bechtel entities, USD 2,000,000 was allocated to Bechtel Limited for "salaries paid to United Kingdom employees on the PC-2 Project who were detained by Iraq".

404. Bechtel calculated the net amount of its claim by deducting USD 2,000,000 from the gross amount of its asserted losses. This is the correct approach and the Panel has followed it in reaching its conclusion.

F. Summary of recommended compensation for Bechtel

405. Based on the Panel's findings regarding Bechtel's claim, the following is the calculation:

Table 5. Recommended compensation for Bechtel

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	3,034,465	3,034,465
Loss of profits	4,121,064	nil
Payment or relief to others	3,458,869	2,047,620
Finance costs	1,399,029	nil
Less insurance recovery	(2,000,000)	(2,000,000)
Total	10,013,427	3,082,085

406. The Panel recommends compensation in the amount of USD 3,082,085. The Panel finds the date of loss to be 2 August 1990.

XV. THE CLAIM OF DAVY MCKEE (LONDON) LIMITED

407. Davy McKee (London) Limited ("Davy McKee"), a corporation existing under the laws of the United Kingdom, is a "trading company concerned with the provision of research and development, process engineering, technology licensing and commissioning services for a range of proprietary and licensed-in technology". On 28 September 1988, Davy McKee entered into a contract with the State Enterprise for Phosphate, Iraq ("SEP") for a NPK Granulation (Fertiliser) Plant at Al-Qaim in Iraq on a lump sum (fixed price) turnkey basis. The total value of the contract was GBP 13,596,000. On 26 March 1989, SEP assigned the contract to the Ministry of Industry, Fertiliser Projects Commission, Baghdad ("FPC"). Davy McKee asserts that the contract was disrupted due to Iraq's invasion and occupation of Kuwait.

408. Davy McKee seeks compensation in the total amount of USD 3,047,678 (GBP 1,603,079) for contract losses, including: (a) equipment delivered; (b) equipment not shipped; (c) site services; (d) materials supplied; and (e) retention monies.

A. Contract losses (equipment delivered)

1. Facts and contentions

409. Davy McKee seeks compensation in the amount of USD 246,223 (GBP 129,513) for equipment delivered to the project site in Iraq, in respect of which it allegedly received no payment from the Iraqi employer. Davy McKee calculates its claim as follows:

Table 6. Davy McKee's claim for contract losses (equipment delivered)

Item	Claim amount (GBP)
Invoice 97152	48,300
Invoice 97409	59,245
Invoice 97441	10,000
Invoice 97821	34,824
Sub-total	152,369
Less advance payment (15 per cent)	(22,856)
Total	129,513

410. The invoice number, description of equipment, date of invoice, and date of delivery of the equipment to Iraq, appear in table 7, infra.

Table 7. Davy McKee's claim for contract losses (equipment delivered)

Invoice	Description of equipment	Date of invoice	Date of delivery to Iraq
No. 97152	Rubber	30 November 1989	November 1989
No. 97409	Starters, fuses, transformers, etc.	22 March 1990	February 1990
No. 97441	Belting, mortar, etc.	27 August 1990	March 1990
No. 97821	Filter spares	19 September 1990	July 1990

2. Analysis and valuation

411. The Panel finds that Invoices 97152, 97409 and 97441 relate to equipment that was delivered prior to 2 May 1990. The claim is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation.

412. The Panel finds that the equipment the subject of Invoice 97821 was delivered on or about 16 July 1990. Davy McKee presented the shipping documents required for payment on 19 September 1990. The Panel finds that payment was not made due to Iraq's invasion and occupation of Kuwait. The Panel finds that Davy McKee provided sufficient evidence in support of its claim.

413. The gross amount of Invoice 97821 is GBP 34,824. Applying the approach with respect to advance payments set out in paragraphs 64 to 67 of the Summary, the Panel deducts fifteen per cent of this amount (GBP 5,224), attributable to the advance payment. Accordingly the Panel recommends compensation in the amount of GBP 29,600 for Invoice 97821.

3. Recommendation

414. The Panel recommends compensation in the amount of USD 56,274 (GBP 29,600) for contract losses (equipment delivered).

B. Contract losses (equipment not shipped)

1. Facts and contentions

415. Davy McKee seeks compensation in the amount of USD 645,860 (GBP 339,723) in respect of equipment, which it asserts it could not ship to the project site in Iraq because of Iraq's invasion and occupation of Kuwait. Davy McKee calculates its claim as follows:

Table 8. Davy McKee's claim for contract losses (equipment not shipped)

Item	Claim amount (GBP)
Materials attempted but unable to ship	172,414
Materials held in store, not attempted to ship	179,916
Shipping related costs	1,073
Storage costs	3,000
Sub-total	356,403
Less advance payment (15 per cent)	(53,010)
Arithmetic error	36,330
Total	339,723

416. The Panel notes that Davy McKee has miscalculated its total loss. According to the above figures and taking into account the arithmetic error, the amount claimed for equipment shipped is USD 576,793 (GBP 303,393), not USD 645,860 (GBP 339,723).

417. In respect of the "materials attempted but unable to ship", the evidence provided by Davy McKee reveals that Davy McKee had arranged for a container of spare parts to be shipped aboard the "Red Sea Europa" from Felixstowe to Aqaba on 21 July 1990. The ship left Felixstowe on 21 July 1990, however, on 9 August 1990, FPC advised Davy McKee that the ship had arrived at Aqaba but the container shipped by Davy McKee was not with the vessel. Subsequent correspondence from the shipper indicates that another container was erroneously shipped instead of Davy McKee's container. Davy McKee asserts that the materials could not be subsequently shipped because of Iraq's invasion and occupation of Kuwait.

418. In respect of the "materials held in store, not attempted to ship" Davy McKee indicates that it held the spare parts which it had obtained from various suppliers in compliance with its contractual obligations in Prestagrove Warehouse unable to be shipped "because of sanctions imposed".

419. Davy McKee asserts that it offered all of the spare parts for sale back to the original suppliers, and to second hand dealers and local scrap dealers, but primarily because the equipment was custom built for a particular project only one supplier, Warman International Limited, offered to repurchase the spare parts at an acceptable price.

420. On 16 November 1993 Warman International Limited repurchased the spare parts it had supplied to Davy McKee for GBP 2,500. On 1 December

1993, Davy McKee sold the remainder of the stored equipment to ZAK International Ltd. for a total amount of GBP 5,000.

2. Analysis and valuation

421. The Panel finds that both the "materials attempted but unable to ship", and the "materials held in store, not attempted to ship" could not be shipped to the project site because of the disruption to shipping caused by Iraq's invasion and occupation of Kuwait.

422. The Panel finds that Davy McKee provided sufficient evidence to support its claim.

423. The Panel finds that the amount of GBP 356,403 in respect of equipment not shipped is compensable in principle. However, the Panel finds that the amount of GBP 2,500 received from Warman International Limited and the amount of GBP 5,000 received from ZAK International Ltd. constitute compensation received from another source in respect of the equipment not shipped and should be deducted from any compensation recommended by the Panel.

424. Furthermore, the Panel finds that, applying the approach with respect to advance payments set out in paragraphs 64 to 67 of the Summary, the amount of GBP 53,010 in respect of the advance payment should be deducted from the recommended compensation amount.

3. Recommendation

425. The Panel recommends compensation in the amount of USD 562,534 (GBP 295,893) for contract losses (equipment not shipped).

C. Contract losses (site services)

426. Davy McKee seeks compensation in the amount of USD 657,223 (GBP 345,699) for site services, including (a) site services performed prior to Iraq's invasion of Kuwait and in respect of which no invoices have been rendered; and (b) site services performed by five of Davy McKee's personnel who, after Iraq's invasion of Kuwait, were detained at the site as hostages until they were allowed to leave for the United Kingdom on 21 December 1990.

427. In respect of item (a), Davy McKee asserts that it was not possible to submit invoices to FPC for signature as a result of Iraq's invasion and occupation of Kuwait.

428. In respect of item (b), Davy McKee asserts that "due to the hostilities it was not possible to have time-sheets signed by the Purchaser, such being a pre-condition to recovery under the Midland Bank Loan".

429. The claim includes GBP 30,135 for airfares for the employees. Davy McKee makes an allowance of GBP 44,712 in respect of the advance payment.

430. The Panel finds that Iraq's invasion and occupation of Kuwait prevented Davy McKee from obtaining payment for the site services. Davy McKee was unable to present the invoices or the timesheets to FPC for signature. This meant, in accordance with the terms of the contract, that Davy McKee could not obtain payment of the invoices.

431. The Panel finds that the value of the site services performed after 2 May 1990 is GBP 256,828. The Panel finds that the value of the airfares incurred after 2 May 1990 is GBP 11,611.

432. Furthermore, the Panel finds that, applying the approach with respect to advance payments set out in paragraphs 64 to 67 of the Summary, the amount of GBP 44,712 in respect of the advance payment should be deducted from the recommended compensation amount.

433. The Panel recommends compensation in the amount of USD 425,337 (GBP 223,727) for contract losses (site services).

D. Contract losses (materials supplied)

434. Davy McKee seeks compensation in the amount of USD 330,899 (GBP 174,053) for materials supplied and incorporated within the contract works prior to Iraq's invasion and occupation of Kuwait. Davy McKee asserts that no invoices were rendered in respect of the materials prior to the invasion, "since they would have been the subject of a claim for payment under the General Condition 34 of the Project Contract. Due to Iraq's invasion and occupation of Kuwait no such opportunity to submit a claim and cause payment to be effected will occur."

435. The Panel finds that Davy McKee did not substantiate its claim. The evidence provided by Davy McKee indicates that the materials the subject of the claim were outside the terms of the contract between Davy McKee and FPC. Davy McKee provided telexes to FPC confirming the price of the materials, but no evidence that the price was accepted by FPC or that FPC was obliged to pay for any materials supplied.

436. The Panel recommends no compensation for contract losses (materials supplied).

E. Contract losses (retention monies)

437. Davy McKee seeks compensation in the amount of USD 1,167,473 (GBP 614,091) for retention monies due upon presentation of a copy of the take-over/qualifying certificate.

438. Davy McKee states that due to Iraq's invasion and occupation of Kuwait, the taking over certificate was, and never will be, issued. Davy McKee asserts that the five employees who remained on site until 21

December 1990 would have been capable of commissioning the plant, however the non-availability of the spare parts and replacement items rendered this impossible. Davy McKee further asserts that, by 23 November 1990, the plant was running at 140 per cent of the process guarantee, even though erection and commissioning were not in strict compliance with the contract conditions.

439. The Panel finds that under the terms of the contract, the five per cent retention monies were payable upon the issue of the taking over certificate, which was due to be issued after 2 May 1990.

440. Applying the approach taken with respect to losses arising as a result of unpaid retentions set out in paragraphs 78 to 84 of the Summary, the Panel recommends compensation in the amount of GBP 614,091.

441. The Panel recommends compensation in the amount of USD 1,167,473 (GBP 614,091) for contract losses (retention monies).

F. Deduction of advance payment

442. Davy McKee states that it received an advance payment of GBP 2,039,400 from SEP on 25 October 1988. The evidence provided by Davy McKee indicates that between 28 February 1989 and 2 August 1990 it performed work to the value of GBP 12,803,015. A total of GBP 1,920,452 of this GBP 12,803,015 was withheld by SEP/FPC in repayment of the advance payment. This means that Davy McKee still retains GBP 118,948 of the advance payment.

443. In the above recommendations for compensation for (a) equipment delivered, (b) equipment not shipped, and (c) site services, the Panel recommended that a total of GBP 102,946 be deducted in respect of the advance payment.

444. Applying the approach with respect to advance payments set out in paragraphs 64 to 67 of the Summary, the Panel finds that Davy McKee must account for the remaining GBP 16,002 of the advance payment in reduction of its claim.

445. The Panel recommends that any award of compensation to Davy McKee be reduced by USD 30,422 (GBP 16,002) to reflect the advance payment retained by Davy McKee.

G. Deduction of amount received on ECGD guarantee

1. Facts and contentions

446. Davy McKee purchased "pre-credit risk cover" on its contract with SEP from the Export Credits Guarantee Department of the United Kingdom ("ECGD") on 22 March 1989. On 27 January 1993 it brought legal action against ECGD claiming GBP 890,981 under the guarantee for (a) equipment delivered, (b) equipment not shipped, (c) site services, and (d) materials supplied. On

18 November 1994, it settled the action with ECGD for GBP 250,000. The settlement agreement provided that Davy McKee should remain liable to account to ECGD for 59.74 per cent of any recoveries made by Davy McKee in respect of the subject matter of the action, up to a maximum amount of GBP 250,000. The settlement agreement did not specify to which part of the GBP 890,981 claimed the GBP 250,000 related.

2. Analysis and valuation

447. The Panel finds that Davy McKee received compensation from another source in respect of the first four loss types included in its claim, namely, (a) equipment delivered, (b) equipment not shipped, (c) site services, and (d) materials supplied. Davy McKee did not receive compensation from the ECGD in respect of the fifth loss type included in its claim, namely, retention monies.

448. The Panel recommends that any award of compensation to Davy McKee be reduced by USD 475,285 (GBP 250,000) to reflect the compensation paid by ECGD to Davy McKee.

H. Summary of recommended compensation for Davy McKee

449. Based on its findings regarding Davy McKee's claim, the following is the calculation:

Table 9. Recommended compensation for Davy McKee

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses:		
Equipment delivered	246,223	56,274
Equipment not shipped	645,860	562,534
Site services	657,223	425,337
Materials supplied	330,899	nil
Retention monies	1,167,473	1,167,473
Sub-total	3,047,678	2,211,618
Less amount received from ECGD		(475,285)
Less advance payment retained		(30,422)
Total	3,047,678	1,705,911

450. The Panel recommends compensation in the amount of USD 1,705,911. The Panel finds the date of loss to be 2 August 1990.

XVI. THE CLAIM OF ABB LUMMUS CREST INC.

451. ABB Lummus Crest Inc. ("ABB Lummus"), a United States corporation, was, at the time of Iraq's invasion of Kuwait, providing engineering and other services in relation to the PC-2 Project - a large petrochemicals production facility located 60 kilometres from Baghdad, Iraq. The facility was owned by the Ministry of Industry and Minerals of Iraq ("MIM"). The Technical Corps for Special Projects ("Techcorp"), an agency of MIM, was responsible for supervising the construction of PC-2.

452. The PC-2 Project was in the early stages of construction at the time of Iraq's invasion of Kuwait. Upon its completion, it was intended to comprise ethylene, styrene and polystyrene plants to produce a variety of petrochemical products to be used for plastics and synthetic fibre production for both domestic and export markets.

453. ABB Lummus seeks compensation in the total amount of USD 30,230,415 for contract losses, loss of profits, "project shutdown expenses", interest and claim preparation costs in connection with work undertaken on the PC-2 Project.

454. For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to ABB Lummus' claim for interest.

455. The claim preparation cost element is in the amount of USD 90,000. Applying the approach taken with respect to claim preparation costs set out in paragraph 60 of the Summary, the Panel makes no recommendation for claim preparation costs.

456. The claim in respect of the polystyrene plant is also filed on behalf of Huntsman Chemical Corporation, a United States corporation ("Huntsman Chemical"). Huntsman Chemical was a signatory to a contract for the licensing of its proprietary polystyrene process with Techcorp. Documents submitted with the claim confirm that Huntsman Chemical has given its consent to ABB Lummus to file the claim on its behalf.

457. ABB Lummus' asserted losses arose out of four main agreements entered into between 31 July 1988 and 12 August 1989 in respect of the ethylene, styrene and polystyrene plants at the PC-2 Project. A summary of those agreements and a brief chronology of the PC-2 Project follows.

A. Summary of agreements

1. The Ethylene Contract

458. On 31 July 1988, ABB Lummus entered into a contract with Techcorp with respect to the construction of a 420,000 MTA ethylene plant at PC-2 (the "Ethylene Contract"). The Ethylene Contract covered basic and detailed engineering, procurement and construction supervision services, as well as training and commissioning advisory services.

459. The Ethylene Contract comprised two parts: (a) a technology licence; and (b) engineering and other services.

460. The Ethylene Contract became effective on 1 September 1988. It was amended by Supplemental Agreements dated 1 September 1988 (to place a "ceiling" on the number of manhours that were to be billed at the rates specified in Exhibit IV to the Ethylene Contract) and 31 July 1989 (to include provisions for the procurement and delivery of equipment and materials by ABB Lummus). The Ethylene Contract was further amended on 16 June 1990 to take account of the barter arrangement referred to in paragraphs 469 to 475.

2. The Supply Contract

461. On 28 December 1988, ABB Lummus and Techcorp entered into a related contract to supply materials for ten pyrolysis heater units to be constructed by Techcorp at the ethylene plant (the "Supply Contract").

3. The "credit crisis"

462. In November 1988, Techcorp opened the letter of credit required under the Ethylene Contract and the Supply Contract at the Central Bank of Iraq. The letter of credit (for an initial amount of USD 3,000,000) was confirmed by the Banca Nazionale del Lavoro ("BNL"), Atlanta branch. In January 1989, the letter of credit was increased to USD 30,000,000.

463. ABB Lummus exhausted this credit line in August 1989. Techcorp subsequently agreed to increase the credit line by a further USD 23,827,776. However, as a result of legal action between ABB Lummus and BNL, the increase was delayed until March 1990. The amended letter of credit (in the amount of USD 53,827,776) contained three separate and independent amounts for engineering services, materials for pyrolysis heaters and licence fees. ABB Lummus states that Techcorp stopped funding the letter of credit following the March 1990 amendment.

464. ABB Lummus states that the limits of the letter of credit allocated to engineering services and heater materials were immediately exhausted by ABB Lummus' receivables covering 1989 services and materials.

465. ABB Lummus further states that Techcorp's failure to continue funding the letter of credit constituted a material breach under both the Ethylene Contract and the Supply Contract. However, ABB Lummus decided to continue to supply engineering, procurement and construction supervision services and materials to the ethylene plant. The decision of ABB Lummus to continue supplying services and materials was made in reliance upon representations and assurances by Techcorp that it would provide ABB Lummus with the necessary security for payment of its future work through a barter arrangement using crude oil supplied through the State Oil Marketing Organisation of Iraq ("SOMO").

4. The Styrene Contract

466. On 10 August 1989, Techcorp and ABB Lummus signed an agreement under which ABB Lummus was engaged to prepare a Basic Design Engineering Package for a downstream styrene plant at PC-2 (the "Styrene Contract"). The Styrene Contract became effective on 5 September 1989.

5. The Polystyrene Contract

467. On 12 August 1989, Techcorp and Huntsman Chemical signed an agreement under which Techcorp was granted a licence to use Huntsman Chemical's proprietary polystyrene production process (the "Polystyrene Contract"). Under the Polystyrene Contract, ABB Lummus was designated as Huntsman Chemical's agent to prepare a Basic Design Engineering Package for the polystyrene plant at PC-2. ABB Lummus was also appointed Huntsman Chemical's agent for the collection of all amounts payable by Techcorp under the contract.

468. The Polystyrene Contract became effective on 1 September 1989.

6. Memorandum of Understanding (barter arrangement)

469. On 14 December 1989, Techcorp informed ABB Lummus by letter that MIM had obtained "Iraqi Higher Authority" to use Iraqi crude oil as barter for the completion of the Ethylene Contract. The management of ABB Lummus decided to complete the Ethylene and Supply Contracts in reliance on the assurances of the Government of Iraq.

470. The barter arrangement "arose out of Techcorp's lack of access, starting in the fall of 1989, to US dollars to make payments as required under the Ethylene Contract".

471. ABB Lummus appointed Chevron International Oil Company ("Chevron") as its oil lifting representative and to assist ABB Lummus in negotiating the terms of the barter arrangement. Between January and May 1990, extensive meetings took place and correspondence was exchanged between ABB Lummus, Techcorp, Chevron and SOMO in relation to the terms of the barter arrangement.

472. Between 13 and 16 June 1990, ABB Lummus and Techcorp met at Techcorp's headquarters in Baghdad for the purpose of executing the necessary agreements to bring the barter arrangement into operation. On 16 June 1990, ABB Lummus and Techcorp signed a Memorandum of Understanding setting out the terms of the barter arrangement. ABB Lummus states that Techcorp subsequently failed to comply with its obligations (a) to obtain the signatures of Chevron and SOMO to the Memorandum of Understanding, and (b) to supply sufficient oil to Chevron.

473. Under the terms of the barter arrangement, Techcorp was to make payments to ABB Lummus under the Ethylene Contract by means of a letter of

credit to be opened by Chevron in favour of SOMO and payable to ABB Lummus. The barter agreement was expressed to incorporate the terms of an oil sales contract entered into between Chevron and SOMO. SOMO, acting on Techcorp's behalf, was to supply crude oil to Chevron, acting on ABB Lummus' behalf. Chevron was to sell the oil on the world markets and deposit the net proceeds from such sales in a special letter of credit account at the Union Bank of Switzerland, London branch. ABB Lummus was to be the sole beneficiary of this letter of credit. The agreement provided for the supply of oil between June 1990 and May 1991 to generate proceeds in the amount of USD 138.6 million. ABB Lummus estimated that its work on the ethylene plant would end in May 1991 and this amount would have covered all the services it expected to perform under the Ethylene Contract.

474. On 16 June 1990, ABB Lummus and Techcorp also signed amendments to the Ethylene Contract substituting the barter terms for the original payment terms.

475. ABB Lummus states that the "barter arrangement was about to begin operations at the time of Iraq's invasion of Kuwait".

476. On 18 February 2000, the Panel issued a procedural order in which it requested ABB Lummus to provide further information concerning shipments of oil under the Memorandum of Understanding, an agreed "ceiling" on the number of man-hours to be invoiced under the Ethylene Contract and Techcorp's approval of invoices for work performed under the Ethylene Contract. ABB Lummus submitted its response to the procedural order on 17 March 2000.

B. Contract losses and loss of profits

1. Facts and contentions

477. ABB Lummus seeks compensation in the amount of USD 27,558,636 (amended from the original claim in the amount of USD 32,848,962) for contract losses and loss of profits. The individual items forming part of the claim for contract losses and loss of profits together with the amounts claimed and amount of compensation recommended by the Panel are set out in table 10, infra.

Table 10. ABB Lummus' claim for contract losses and loss of profits

Loss item	Amount claimed (USD)	Recommended compensation (USD)
Engineering services rendered under the Ethylene Contract	14,265,990 (amended from USD 14,564,316)	6,085,661
"Loss of profits" under the Ethylene Contract	2,870,000 (amended from USD 7,862,000)	nil
Materials supplied and construction supervisory services rendered under the Supply Contract	532,646	65,800
Unpaid licence fees under the Styrene Contract	4,600,000	nil
Engineering services rendered under the Styrene Contract	40,000	nil
Unpaid licence fees under the Polystyrene Contract	5,250,000	nil
Total	27,558,636	6,151,461

2. Analysis and valuation

478. The Panel's analysis and valuation of each of the individual items forming part of the claim for contract losses and loss of profits is set out in the following section.

479. It is appropriate to begin by addressing certain specific arguments upon which ABB Lummus relies. The first is an argument based on the clauses in the contracts with Techcorp which deal, respectively, with the outbreak of war and frustration. Those clauses are as follows:

"Outbreak of war and termination

If during the currency of the Contract there shall be an outbreak of war (whether war is declared or not) in any part of the world which, whether financially or otherwise, materially affects the execution of the Works the Contractor shall, unless and until the Contract is terminated under the provisions in this clause contained, use its best endeavours to complete the execution of the Works, provided always that

If the Contract shall be terminated as aforesaid the Contractor shall be paid by the Employer (in so far as such amounts or items shall not have already been covered by payments on accounts made to the Contractor) for all work executed prior to the date of termination at the rates and prices provided in the Contract ..."

"Frustration

In the event of the Contract being frustrated the sum payable by the Employer to the Contractor in respect of work executed shall be the same as that which would have been payable under [the outbreak of war and termination clause] hereof if the Contract had been terminated under the provisions of [that clause]."

480. ABB Lummus asserts that Techcorp insisted on the inclusion of these clauses in each of the Ethylene Contract, the Supply Contract, the Styrene Contract and the Polystyrene Contract.

481. ABB Lummus argues that the effect of the clauses is, inter alia, to entitle ABB Lummus to recover for all unreimbursed work and deliveries under its contracts without limitation as to the dates on which such work and deliveries were performed. By this argument, ABB Lummus seeks to avoid what it presumably recognises as the serious jurisdictional objection to the recovery, in proceedings before the Commission, of what might conveniently be called "old debt". (See the Summary at paragraphs 68 to 77).

482. For the reasons stated in paragraphs 103 to 110 of the Summary, the Panel rejects this argument.

483. ABB Lummus also argues that "all claims of ABB Lummus, regardless of their date, fall within the UNCC's jurisdiction". In support of this argument, ABB Lummus states that the Memorandum of Understanding dated 16 June 1990, which laid down the terms of the barter arrangement, had its origin in the notification by the Iraqi Higher Authority given on 14 December 1989. In that notice, the Iraqi Higher Authority approved "funds from oil sales to cover the requirements associated with the progress of work on the Ethylene unit". ABB Lummus argues that the Memorandum of Understanding "was structured in such a way that the unavailability of foreign currency would not have impeded its purpose in any way", and that this therefore circumvents the "old debt" rule. (See the Summary at paragraphs 68 to 77).

484. For the reasons stated in paragraphs 109 to 110 of the Summary, the

those contracts was performed, as its performance under the relevant contracts was "indivisible" in nature.

486. In support of this argument, ABB Lummus refers to the conclusion reached by the "E1" Panel of Commissioners in the Report and Recommendations made by the Panel of Commissioners concerning the Third Instalment of "E1" Claims (S/AC.26/1999/13). However, the "E1" Panel's conclusion in its Report and Recommendations concerned an exceptional factual situation relevant to one particular claim considered by that Panel. That situation is not replicated in ABB Lummus' claim. Each of the Ethylene Contract, the Styrene Contract and the Polystyrene Contract contained detailed provisions stating when the licence fees and other amounts payable fell due for payment. In the case of the licence fees, payment fell due upon the completion of specific milestones described more fully in the contracts. In the case of other services provided, each of the contracts provided for ABB Lummus (or Huntsman Chemical in the case of the Polystyrene Contract) to submit its invoice within 15 days of the end of the month for the costs incurred during such month. These provisions demonstrate that the obligations of ABB Lummus under the Ethylene Contract, the Styrene Contract and the Polystyrene Contract, and Huntsman Chemical under the Polystyrene Contract, were "divisible" in nature. Indeed, it seems inconceivable that ABB Lummus would have agreed to any of these contracts on any other basis than one on which it was reimbursed from time to time for its services. Accordingly, it seems quite clear to the Panel that these contracts do not satisfy the criteria of "indivisibility" used by the "E1" Panel.

(a) Engineering services rendered under the Ethylene Contract

487. The claim is for labour costs, non-payroll costs and vendor engineering services rendered under the Ethylene Contract, which have allegedly not been paid by Techcorp.

488. ABB Lummus states that the letter of credit provided by Techcorp as payment security under the Ethylene Contract was sufficient to cover ABB Lummus' engineering, procurement and construction management services through December 1989 and part of January 1990. According to ABB Lummus, Techcorp failed to provide letter of credit coverage for any subsequent ABB Lummus services.

489. However, in reliance on Techcorp's representations that future services would be protected by an oil lift barter arrangement, ABB Lummus continued to provide services under the Ethylene Contract until 2 August 1990. On 14 December 1990, ABB Lummus received official notification from

to whom ABB Lummus sub-contracted part of the engineering work under the Ethylene Contract. Documents submitted with the claim confirm that SETAL has given its consent to ABB Lummus to file the claim on its behalf.

491. The Ethylene Contract was amended by a Supplemental Agreement dated 1 September 1988 pursuant to which the parties agreed to place a "ceiling" on the number of engineering and procurement manhours that were to be billed at the rates specified in Exhibit IV to the Ethylene Contract. The Supplemental Agreement provided for additional manhours to be invoiced at the single rate of USD 40 per hour if the agreed ceiling of 440,000 manhours was exceeded.

492. The claim is for amounts included in nine invoices dated between 11 February and 18 September 1990 ("invoice nos. 1-9"). Eight of the invoices relate to work performed by ABB Lummus between 1 January and 17 August 1990. The remaining invoice, dated 17 February 1990, relates to the second instalment of the technology licence fee payable by Techcorp under the Ethylene Contract.

493. The Panel finds that Techcorp is an agency of the State of Iraq. The Panel finds that the asserted losses in respect of invoice nos. 1-4 and 9 (in the total amount of USD 7,466,350) relate to work performed between January and April 1990, i.e., prior to 2 May 1990. The claim for these unpaid invoices is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation for invoice nos. 1-4 and 9.

494. The Panel finds that the asserted losses in respect of invoice No. 5 (in the total amount of USD 1,574,127) relate to work that was performed between 21 April and 18 May 1990. The claim for unpaid amounts in respect of work performed prior to 2 May 1990 is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Having reviewed the evidence provided by ABB Lummus, the Panel was able to identify the value of the work performed subsequent to 2 May 1990 as USD 860,148, and recommends compensation in this amount in respect of invoice No. 5.

495. The Panel finds that the asserted losses in respect of invoice nos. 6-8 (in the total amount of USD 5,225,513) relate entirely to work that was performed between June and August 1990, i.e., subsequent to 2 May 1990. The claim for these unpaid invoices is therefore within the jurisdiction of the Commission. On the evidence provided, the Panel is satisfied that ABB Lummus is entitled to payment of invoice nos. 6-8.

(b) "Loss of profits" under the Ethylene Contract

496. ABB Lummus states in the Statement of Claim:

> "Due to the abrupt termination of the ethylene project as a result of Iraq's invasion of Kuwait, ABB Lummus lost profits which it would have realized if its work under the Ethylene Contract had been completed".

497. ABB Lummus states that "the claim for lost profits represents the difference between the predicted total gross profit margin on the completed project and the gross profit margin on the amounts committed as of 17 August 1990".

498. The claim comprises (a) the unpaid instalments of the technology licence fee payable by Techcorp under the Ethylene Contract (the third and fourth instalments in the aggregate amount of USD 1,000,000) and (b) loss of profits (USD 2,042,000). ABB Lummus discounted the total amount of its claim by 15 per cent "to reflect the time value of money".

(i) Unpaid licence fees

499. ABB Lummus states that the third and fourth instalments of the technology licence fee under the Ethylene Contract fell due upon the occurrence of certain events as set out below.

500. Under clause 6.3 of the Ethylene Contract: (a) the third instalment fell due "30 days after successful demonstration test (as defined in Article 12)"; and (b) the fourth instalment fell due "30 days after the plant has attained design capacity in a production mode (excluding the acceptance test) or 54 months after the date of signing the contract, whichever comes first".

501. Clause 12.3 of the Ethylene Contract reads, "If the acceptance tests are not completed ... for a period of not more than 60 days by force majeure ... payment [of the licence fee] related to completion of this test shall become immediately due and payable". ABB Lummus asserts that Iraq's invasion of Kuwait constituted a force majeure event and that the final two licence payments fell due on 2 August 1990.

502. For the reasons stated in paragraphs 482 to 486, supra, and applying the approach set out in paragraphs 103 to 110 of the Summary, the Panel rejects ABB Lummus' arguments. The events referred to in clause 6.3 of the Ethylene Contract never occurred. The Panel further finds that ABB Lummus did not issue invoices in respect of the third and fourth instalments. Accordingly, ABB Lummus did not become entitled to payment of the amounts

(ii) Loss of profits

503. In support of its claim for loss of profits, ABB Lummus provided a number of documents, including project financial tabulations for the period 20 January 1989 to 17 August 1990 as well as a "Report on Lost Profits for the PC-2 Ethylene Project" prepared by KPMG. Despite a request to provide copies of the audited and unaudited financial statements and other financial information in respect of its Iraqi operations, ABB Lummus provided only consolidated financial statements for Asea Brown Boveri Inc. for the period 31 December 1989 to 31 December 1993.

504. It is clear from the documents provided by ABB Lummus that ABB Lummus' claim for lost profits expected to be earned on the PC-2 Project does not take into account the "risk margin" for the project. (See paragraphs 111 to 119 of the Summary). It is clear that certain risks would have eventuated. For example, ABB Lummus' expected profits would have been reduced by administrative expenses, such as interest, commission payable to Chevron under the Compensation Agreement dated 29 June 1990 and other financial expenses, which could have resulted in a net loss to ABB Lummus. The Panel finds that the evidence provided by ABB Lummus is insufficient to enable it to identify the profits that would have been earned on the project with any reasonable certainty. ABB Lummus failed to demonstrate that its work on the PC-2 Project would have been profitable as a whole.

505. The Panel finds that ABB Lummus failed to fulfil the evidentiary standard for loss of profits claims set out in paragraphs 125 to 131 of the Summary. Accordingly, the Panel recommends no compensation for loss of profits.

(c) Materials supplied and construction supervisory services rendered under the Supply Contract

506. ABB Lummus states that it "relied on the oil lift barter agreement ... while incurring additional expenses for materials for pyrolysis heaters and in performing additional construction supervisory services under the Supply Contract".

507. The schedule of unpaid invoices provided by ABB Lummus indicates that the heater materials were supplied in March 1990 and the installation of the heaters took place between May and August 1990.

508. The claim for materials supplied and services rendered prior to 2 May 1990 is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Accordingly, applying the approach taken with respect to the "arising prior to" clause in paragraph

identify the value of the materials supplied and services rendered subsequent to 2 May 1990 and recommends compensation in the amount of USD 65,800 for materials supplied and services rendered under the Supply Contract.

(d) Unpaid licence fees under the Styrene Contract

509. Under the Styrene Contract, ABB Lummus' fees for basic design engineering services were included in a lump sum licence fee in the amount of USD 4,600,000. All instalments were payable in United States dollars and were due within 30 days from the receipt of the invoice.

510. The licence fee under the Styrene Contract was payable in five instalments. ABB Lummus states that it completed the work and invoiced Techcorp in relation to the first three instalments (in the aggregate amount of USD 3,050,000).

511. The fourth instalment (in the amount of USD 1,025,000) was payable by Techcorp upon delivery by ABB Lummus of the Basic Design Engineering Package). ABB Lummus states that it completed the Basic Design Engineering Package, but did not give it to Techcorp "due to non-payment of previous instalments".

512. ABB Lummus states that the fifth (final) instalment (in the amount of USD 525,000) represented the "profit component" under the Styrene Contract. It fell due at the latest on 5 September 1992, i.e., 36 months from the effective date of the Styrene Contract.

513. No invoices were issued for the fourth and fifth instalments.

514. The Panel finds that the asserted losses in respect of the first three instalments relate entirely to work that was performed prior to 2 May 1990. The claim for these unpaid licence fees is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation.

515. The Panel finds that ABB Lummus made a commercial decision not to give the Basic Design Engineering Package to Techcorp and that it did not issue invoices in respect of the fourth and fifth instalments. Accordingly, ABB Lummus did not become entitled to payment of the amounts claimed. The Panel recommends no compensation for unpaid licence fees under the Styrene Contract.

(e) Engineering services

a proposed change to the styrene plant. The work was not covered by the licence fee and was payable separately in the amount of USD 40,000. ABB Lummus states that it prepared this report and handed it to Techcorp, but was not paid for it.

517. In support of its claim, ABB Lummus provided copies of correspondence with Techcorp. This correspondence indicates that the engineering services were rendered in late 1989.

518. The Panel finds that the contract losses alleged by ABB Lummus relate entirely to work that was performed prior to 2 May 1990. The claim for engineering services rendered under the Styrene Contract is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation for engineering services rendered under the Styrene Contract.

(f) Unpaid licence fees under the Polystyrene Contract

519. The Polystyrene Contract entered into between Techcorp and Huntsman Chemical designated ABB Lummus its agent for collection of amounts payable to Huntsman Chemical. The claim for unpaid licence fees under the Polystyrene Contract is also filed on behalf of Huntsman Chemical.

520. The Polystyrene Contract provided for payment of a lump sum licence fee of USD 6,000,000. This fee covered both ABB Lummus' services in preparing the Basic Design Engineering Package and Techcorp's right to use the technology of Huntsman Chemical and ABB Lummus in the construction and operation of the plant. The licence fee was payable in six instalments. ABB Lummus states that it received payment in respect of the first instalment (in the amount of USD 750,000) only.

521. ABB Lummus states that the work in respect of the second instalment (in the amount of USD 725,000) was performed and Techcorp was invoiced for this work. The invoice for this work is dated 23 January 1990.

522. The third and fourth instalments (in the aggregate amount of USD 2,925,000) were payable by Techcorp upon the issue of process piping and instrument diagrams and the delivery of the Basic Design Engineering Package. ABB Lummus states that the relevant work was completed, however it "did not deliver all of this information to Techcorp due to non-payment of earlier instalments". No invoices were issued for the third and fourth instalments.

523. ABB Lummus states that the fifth and sixth (final) instalments (in

524. The Panel finds that the asserted losses in respect of the second instalment relate entirely to work that was performed prior to 2 May 1990. The claim for this unpaid licence fee is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation.

525. The Panel finds that ABB Lummus made a commercial decision not to give the Basic Design Engineering Package to Techcorp and that it did not issue invoices in respect of the third, fourth, fifth and sixth instalments. Accordingly, ABB Lummus did not become entitled to payment of the amounts claimed. The Panel recommends no compensation for unpaid licence fees under the Polystyrene Contract.

3. Recommendation

526. The Panel recommends compensation in the amount of USD 6,151,461 for contract losses and loss of profits.

C. "Shutdown expenses"

1. Facts and contentions

527. ABB Lummus seeks compensation in the amount of USD 2,581,779 (amended from the original claim in the amount of USD 3,366,648) for expenses incurred in the shutdown of the ethylene plant of the PC-2 Project. The claim is for costs allegedly incurred by ABB Lummus and its Brazilian subsidiary, SETAL. The costs allegedly incurred by ABB Lummus are labour costs and non-payroll home office costs for the period 3 August 1990 to 22 March 1991 (USD 1,865,114). The costs allegedly incurred by SETAL are "layoff costs" relating to 64 employees and costs relating to the "non-productive time of PC-3 employees" (USD 716,665).

528. In its response to the article 34 notification, ABB Lummus withdrew its claim for all items incurred after March 1991 as well as its entire claim for "shutdown expenses" in relation to the Supply Contract.

529. In support of its claim for shutdown expenses in relation to the Ethylene Contract, ABB Lummus relies on the termination and frustration provisions of the Ethylene Contract. The frustration clause (clause 18) provides that, in the event of the Ethylene Contract being frustrated, ABB Lummus was entitled to be paid the amounts set out in the termination clause (clause 17), as if the Ethylene Contract had been terminated under the provisions of that clause. The termination clause [illegible]

further states that the shutdown costs shall "in no event ... exceed thirty (30) calendar days from the date of termination, unless otherwise agreed by the parties".

530. The documentation provided by ABB Lummus in support of its claim indicates that ABB Lummus gave notice to Techcorp under the frustration clause of the Ethylene Contract on 10 August 1990. The notice refers to ABB Lummus' inability to fulfil its obligations under the Ethylene Contract with effect from 2 August 1990. Techcorp's reply dated 12 August 1990 requests ABB Lummus to demobilise its staff "in a very short time, but ... in such a manner that will help quick mobilisation as soon as circumstances permit".

531. The shutdown costs were included in nine invoices dated from 18 September 1990 to 11 April 1991, each of which refer to clause 18 of the Ethylene Contract. ABB Lummus states that none of the invoices were submitted to Techcorp "because Iraq's invasion of Kuwait made it impossible for an ABB Lummus representative to deliver the invoices to Techcorp in Baghdad, which was the practice under the PC-2 Agreements ... and mail was never used on the Project because Iraqi mail was unreliable".

2. Analysis and valuation

532. The Panel finds that pursuant to the notice given by ABB Lummus on 10 August 1990, (stated to be effective as of 2 August 1990), and the provisions of clauses 17 and 18 of the Ethylene Contract, ABB Lummus became entitled under the Ethylene Contract to the costs incurred in shutting down the ethylene plant for the 30 calendar day period from the date of termination of the Ethylene Contract (2 August 1990).

533. ABB Lummus provided a significant amount of documentation in support of the expenses allegedly incurred, including the nine invoices for shutdown expenses and back-up documentation for the costs listed therein. A review of the invoices and back-up documentation indicates that some items, (such as "non-payroll costs incurred in June and July 1990"), do not directly relate to the shutdown of the ethylene plant, and are, therefore, not compensable. Based on the material before it, the Panel finds that ABB Lummus incurred expenses directly related to the shutdown of the ethylene plant between 2 August and 2 September 1990 with a value of USD 811,305, and that these expenses are compensable.

534. With respect to the shutdown expenses claimed on behalf of SETAL relating to the "layoff costs" of 64 employees, (including vacation and "13th month", notice period and retirement fund allowances), and the "non-productive time of PC-3 employees", the Panel finds that ABB Lummus failed

535. The Panel notes that, in relation to those expenses for which it recommended compensation, it was able to identify a clear line of causation between the instruction to shut down the ethylene plant and the invoices supplied. The provisions of the Ethylene Contract referred to above gave rise to an entitlement on the part of ABB Lummus to those expenses that (a) were "directly related" to the shutdown of the ethylene plant, and (b) complied with the temporal restrictions set forth in clauses 17 and 18.

3. Recommendation

536. The Panel recommends compensation in the amount of USD 811,305 for shutdown expenses.

D. Summary of recommended compensation for ABB Lummus

537. Based on its findings regarding ABB Lummus' claim, the Panel recommends compensation in the amount of USD 6,962,766. The Panel finds the date of loss to be 2 August 1990.

XVII. THE CLAIM OF JOHN BROWN, A DIVISION OF TRAFALGAR HOUSE, INC

538. John Brown, a Division of Trafalgar House, Inc. ("John Brown") is a corporation existing under the laws of the United States of America. In this claim, John Brown is maintaining a claim assigned to it by Davy McKee Corporation ("Davy McKee"), another corporation existing under the laws of the United States of America. On January 1990, Davy McKee entered into a contract with the Al Furat Petroleum Company ("Al Furat"), a Syrian joint-stock company. The contract provided for the construction of the Omar Phase II Project in Syria. The Project was designed to upgrade and increase oil production at Syria's Omar oil fields (the "Omar II project").

539. On 1 November 1993, Davy McKee Corporation assigned all claims that it may have arising out of the Omar Phase II Project, to John Brown. John Brown seeks compensation in the total amount of USD 10,065,777 for contract losses, including vendor costs, transportation costs, prolongation costs, and liquidated damages; claim preparation costs; and interest. In the following section, references to "John Brown" include references to Davy McKee.

540. The claim preparation cost element is in the amount of USD 263,653. Applying the approach taken with respect to claim preparation costs set out in paragraph 60 of the Summary, the Panel makes no recommendation for claim preparation costs.

541. The interest element is in the amount of USD 2,159,531. For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to John Brown's claim for interest.

A. Vendor costs

1. Facts and contentions

542. John Brown seeks compensation in the amount of USD 663,927 for the net increase in "vendor costs" incurred on the Omar II project.

543. Under the terms of the contract, John Brown was required to provide on-site vendor representatives for the final commissioning and start-up of the project equipment. In a "vendor report account" dated 24 July 1990, John Brown estimated that, in order to comply with its contractual obligations, it would require 15 vendor representatives to be present on site for a total of 332 man days.

544. John Brown asserts that, from 2 August 1990 onwards, the vendors began to withdraw their personnel and to refuse to send their representatives to the project site because of fears for their safety. John Brown mobilised its own "less-expert and smaller" commissioning team, but these personnel did not have the skills or experience to perform all of the work required. John Brown experienced problems with the commissioning as a result.

545. John Brown calculates its claim for additional "vendor costs" as the difference between John Brown's estimate of the vendor costs prior to Iraq's invasion and occupation of Kuwait and the actual vendor costs which it incurred. In the case of 12 of a total of 18 vendors which John Brown states it required at site, either no additional costs were incurred, or a net saving was made, because the vendors refused to send a representative. However, in the case of six of the 18 vendors, additional costs were incurred because of the problems experienced with the equipment. In the case of these six vendors, John Brown required the vendors to attend the project site for a greater number of days than originally estimated.

2. Analysis and valuation

546. The evidence provided by John Brown indicates that a significant number of the equipment vendors would not send their representatives to the project site at the time that they were required by John Brown because of their concerns about the safety of their personnel in the hostile environment created by Iraq's invasion and occupation of Kuwait.

547. However, while this provides a prima facie case to support the claim, there are considerable difficulties. First, so far as the Panel can determine from the documentation placed before it, there was no contractual obligation on the vendors to send their representatives at all. It appears to have been left to be arranged on an ad hoc basis. John Brown seeks to justify this on the basis of the usage of the industry. In the Panel's opinion, it is not sufficient to simply assert such a usage. It needs to be established by way of evidence.

548. Next, claims based on the difference between the estimate for commissioning costs - which is what is discussed in the present case - and the actual event are notoriously difficult to evaluate; and the commissioning costs are usually under-estimated. In the present case, the estimate for the commissioning costs is contained in the one-page "vendor report account" dated 24 July 1990 referred to at paragraph 543, supra.

549. In seeking to put a figure to its claim, John Brown acknowledges the problem of under-estimation. In calculating the vendor costs for each of the 18 vendors, John Brown increased the estimate of man-days contained in the "vendor report account" dated 24 July 1990, to allow "for extra work and any other factors that are the responsibility of [John Brown]". While the Panel recognises the good faith aspect of such an attempt to put a value on the claim, the exercise itself highlights the difficulty in making a true valuation of any over-run of such cost.

550. The Panel finds that there is no material on the basis of which the Panel can exclude the possibility of other contributing factors to the vendor costs. For example, in Progress Report No. 8 dated 31 August 1990, John Brown recorded that the "area of greatest concern" was the "receiving of data sheets, detail drawings and vendor information on or before

instrumentation arrival". On the evidence provided by John Brown, this fault of the vendors was unrelated to Iraq's invasion and occupation of Kuwait.

551. Indeed, on the evidence before the Panel, it is quite possible that the problems in Iraq and Kuwait provided an excuse on the basis of which the vendors were able to refuse to make their representatives available when there were other, commercial, reasons for withholding assistance at that particular time.

552. The Panel finds that John Brown failed to establish the causal link between its stated losses and Iraq's invasion and occupation of Kuwait.

3. Recommendation

553. The Panel recommends no compensation for vendor costs.

B. Transportation costs

554. John Brown seeks compensation in the amount of USD 1,152,336 for the increase in the cost of transportation of equipment to the Omar II project site due to Iraq's invasion and occupation of Kuwait. The claim is made up of "additional air transportation" (USD 1,081,488) and "increase in air freight costs" (USD 70,848).

(a) Additional air transportation

555. John Brown seeks compensation in the amount of USD 1,081,488 for the increased proportion of air freight to ocean freight used on the Omar II project allegedly as a result of Iraq's invasion and occupation of Kuwait.

556. John Brown asserts that the intention at the time of tender for the Omar II project was for all equipment and materials to be transported to the job site by surface transport, with air transport to be used only in special cases. However, when the vendors refused to send their representatives, causing delays on the project and the threat of liquidated damages, John Brown attempted to accelerate the production schedule by transporting a much greater proportion of equipment and materials by air freight than it would have otherwise.

557. The Panel finds that John Brown failed to establish the causal link between its stated losses and Iraq's invasion and occupation of Kuwait. The evidence provided by John Brown shows that transport by air, instead of by sea, was not a direct result of Iraq's invasion and occupation of Kuwait. Instead, it resulted from the business decision taken by John Brown to attempt to reduce the delays on the Omar II project by increasing the proportion of equipment transported to the project site by air.

558. An internal John Brown memorandum dated 24 January 1991 clearly demonstrates that Iraq's invasion and occupation of Kuwait did not result in the necessity to use air freight. The memorandum provides: "in view of

[problems in transporting equipment by air] we may be better off sending our cargo via ocean freight until the Iraqi situation quiets down. Ocean movement does take 30 days, but this would be the same as having our cargo sit in some airport in Europe".

559. The Panel recommends no compensation for additional air transportation costs.

(b) Increase in air freight costs

560. John Brown seeks compensation in the amount of USD 70,848 for "increase in air freight costs". This amount is further described as "extra-ordinary expenses", i.e., "costs incurred by [John Brown] for miscellaneous additional charges levied for Royalty payment for air charter, inland freight charges Amman to Damascus and other transport costs, all paid in order to move freight during the period in question".

561. The Panel finds that the increase in air freight costs was not directly caused by Iraq's invasion and occupation of Kuwait. It was caused by John Brown's decision to reduce the delays on the Omar II project by utilising air freight instead of ocean freight.

562. The Panel recommends no compensation for increase in air freight costs.

C. Prolongation costs

1. Facts and contentions

563. John Brown seeks compensation in the amount of USD 3,480,656 for the costs incurred because of the prolongation of the Omar II project. The contract nominated 28 January 1991 as the date of issue of the provisional acceptance certificate, but it was not issued until 4 December 1991. John Brown asserts that 3.8 months of the total 9.25 month delay on the Omar II project was due to Iraq's invasion and occupation of Kuwait.

564. John Brown formulates its argument that 3.8 months of the total 9.25 months delay is attributable to Iraq's invasion and occupation of Kuwait as follows:

a. Prior to the invasion, John Brown did not envisage that commissioning would pose any particular problems;

b. Progress was generally on target in August 1990;

c. The vendors refused to send their representatives to the project site over the period August 1990 to March 1991;

d. The absence of vendor representatives prevented the proper commissioning and ready for acceptance testing of many items of equipment;

e. The Omar III project (performed by Davy McKee between September 1992 and December 1993), with full vendor support and using substantially the same Davy McKee management personnel, was completed "precisely on time".

565. John Brown asserts that it lost the following days each month because of the vendors' refusal to come to the project site (total 115.24 = 3.8 months).

Table 11. John Brown's claim for prolongation costs

Month	Days lost	Percentage of days lost as compared to total days in month
July 1990	0.00	0%
August 1990	1.55	5%
September 1990	3.00	10%
October 1990	8.14	25%
November 1990	15.00	50%
December 1990	27.90	90%
January 1991	27.90	90%
February 1991	21.00	75%
March 1991	7.75	25%
April 1991	3.00	10%
May 1991	0.00	0%
Total	115.24	

566. To calculate its prolongation costs, John Brown:

a. Determines the amounts actually spent in respect of all of its project costs (see table 12, infra, for list of costs);

b. Determines the "cost shift" of each of the project costs, i.e., the difference between the costs actually incurred and the original estimate of the costs, for each month from August 1990 to April 1991;

c. Applies the percentage figure in table 11, supra, to determine how much of the "cost shift" is attributable to Iraq's invasion and occupation of Kuwait.

567. John Brown concludes that the prolongation costs due to Iraq's invasion and occupation of Kuwait are as follows:

Table 12. John Brown's claim for prolongation costs

Project cost	Amount (USD)
Head office salaries	1,364,936
Out of pocket expenses	663,385
Field craft hourly labour	17,760
Indirect material expense	650,230
Other home office costs	518,676
Damascus office accommodation	50,448
Damascus office vehicles	132,886
Frustration insurance	82,335
Total	3,480,656

2. Analysis and valuation

568. The Panel finds that John Brown did not substantiate its claim for prolongation costs.

569. The assessment of the time to be allocated to a specific event occurring in the course of a large project is a very complex exercise. One would normally expect it to be done by the use of a computer programme. This would ususally compare the actual development of the works with the contract based programme. The aim is to identify the excusable and the culpable delays. Such an assessment needs to consider the so-called critical path of the project; the related milestones of the programme; and the corresponding resources (labour and equipment). Such a method is generally considered acceptable provided that a proper causal link is identified; a convincing analysis supported by sufficient evidence is detailed for each delay; and the various delays (and acceleration measures if any) are adequately consolidated. On a base such as this, the costs attributable to the extension of time can be correctly calculated.

570. The Panel is not convinced that 3.8 months of the total 9.25 month delay was caused by Iraq's invasion and occupation of Kuwait. The article 34 notification requested further explanation of the method by which John Brown calculated the lost man-days per month (see table 11, supra). In its article 34 response, John Brown merely stated that "the percentages included in "Time Lost Each Month" are the best effort of both the Claimant and its advisor Dal-Sterling at reasonably rationalising the consequences of Iraq's invasion and occupation of Kuwait".

571. The evidence provided by John Brown describes other factors which contributed to the total 9.25 month delay on the project. These included

technical problems with some of the equipment, an employee strike at one of the vendors' sites, and the Ramadan Festival (although the effect of this was described as nominal). The Panel accepts that the refusal of the vendors to send its representatives to the project site caused some delay on the project. However, the Panel is not convinced that other problems, unrelated to Iraq's invasion and occupation of Kuwait, would not have caused a delay as great as 9.25 months, even if Iraq's invasion and occupation of Kuwait had not occurred.

572. In support of its contention that the Omar II project was delayed for 3.8 months by Iraq's invasion and occupation of Kuwait, John Brown places special emphasis on the completion of the Omar III project "precisely on time". John Brown asserts that Omar III was "as technically difficult as Omar II and more difficult to integrate with existing facilities".

573. The Panel is not convinced that the completion of the Omar III project on time supports John Brown's argument that 3.8 months of the total delay of 9.25 months was caused by Iraq's invasion and occupation of Kuwait. On the evidence provided by John Brown an equally plausible explanation is that John Brown experienced no delays on the Omar III project because it could utilise its experience on the Omar II project in dealing with any problems which arose.

3. Recommendation

574. The Panel recommends no compensation for prolongation costs.

D. Liquidated damages

1. Facts and contentions

575. John Brown seeks compensation in the amount of USD 2,345,674 for liquidated damages levied by Al Furat against John Brown.

576. John Brown states that "as a result of the delays in the achievement of the Ready for Acceptance testing dates written into the Contract, AFPC has calculated a penalty of USD 4,775,730.10 as delay penalties or damages and has presented such penalty to [Davy McKee Corporation]. In practice Al Furat has withheld approximately half of this sum by not paying invoices submitted by [Davy McKee Corporation] for the release of retention sums and for Contract payments for executed work".

577. John Brown claims the "actual amount withheld by AFPC for Omar Phase II", which it asserts is equivalent to USD 2,345,674 as at 9 March 1994.

2. Analysis and valuation

578. The Panel finds that John Brown did not provide sufficient evidence that the "liquidated damages" withheld by Al Furat were a direct result of Iraq's invasion and occupation of Kuwait. John Brown acknowledges that only 3.8 months of the delay on the Omar II project was caused by the

invasion, but it makes no attempt to apportion the liquidated damages. Also, the evidence indicates that the final amount withheld by Al Furat was in accordance with a settlement negotiated by Al Furat and John Brown. The settlement appears to have settled all of John Brown's claims under the Contract. Prima facie once a claimant's claims are settled, no claim remains to be pursued. In that event it is necessary to review the filed material to ascertain if there is any basis which displaces the prima facie view. Absent such material, John Brown has not established a loss and, therefore, the Panel is unable to recommend compensation.

3. Recommendation

579. The Panel recommends no compensation for liquidated damages.

E. Summary of recommended compensation for John Brown

580. Based on its findings regarding John Brown's claim, the Panel recommends no compensation.

XVIII. THE CLAIM OF OVERSEAS BECHTEL, INC.

581. Overseas Bechtel, Inc. ("Overseas Bechtel"), a United States corporation, is a wholly owned subsidiary of Bechtel Group Inc., an international construction company based in San Francisco.

582. On 20 July 1988, Overseas Bechtel entered into a Technical Services Agreement ("TSA") with the Technical Corps for Special Projects, Ministry of Industry, Iraq ("Techcorp"). The agreement provided for the provision of engineering, financing, procurement, project management, construction and other related services in relation to the PC-2 Project - a large petrochemicals production facility located 60 kilometres from Baghdad, Iraq.

583. Overseas Bechtel seeks compensation in the total amount of USD 4,915,980 for unpaid amounts under the TSA, loss of profits, payment and relief to others and interest. The total amount of Overseas Bechtel's alleged losses on the PC-2 Project is USD 8,015,980. However, in presenting its claim, Overseas Bechtel deducted the amount of USD 3,100,000 from the gross amount of its alleged losses to take account of amounts recovered from its insurers in respect of some of its losses.

584. For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to Overseas Bechtel's claim for interest.

A. Contract losses

1. Facts and contentions

585. Overseas Bechtel seeks compensation in the amount of USD 5,325,737 for contract losses. The claim is for unpaid amounts invoiced to Techcorp under the TSA.

586. Overseas Bechtel states that it commenced providing "development activities and financial services" under the TSA in July 1988. It continued to provide services to Techcorp up to 2 August 1990, and ceased all work on the PC-2 Project on this date. Following the cessation of work, Overseas Bechtel attempted to negotiate with Techcorp in respect of payment of costs due under the TSA. However, Techcorp made no further payments under the TSA.

587. Overseas Bechtel states that it submitted invoices to Techcorp for services rendered totalling USD 5,325,737. However, although the outstanding invoices were never disputed by Techcorp, the "invoices were either not formally approved for payment by Techcorp or were not paid due to the lack of funds in the letter of credit and no payment has been received".

2. Analysis and valuation

588. The Panel finds that Techcorp is an agency of the State of Iraq.

589. The supporting documentation provided by Overseas Bechtel indicates that the performance that created the debts in question occurred between September 1989 and August 1990. The Panel, therefore, finds that the contract losses alleged by Overseas Bechtel relate partly to work that was performed prior to 2 May 1990.

590. The claim for contract losses relating to work performed prior to 2 May 1990 is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Accordingly, applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, only the contract losses relating to work performed subsequent to 2 May 1990 are compensable. From the documentation provided by Overseas Bechtel, the Panel was able to identify the value of the work performed subsequent to 2 May 1990 and recommends compensation in the amount of USD 1,086,686.

3. Recommendation

591. The Panel recommends compensation in the amount of USD 1,086,686 for contract losses.

B. Loss of profits

1. Facts and contentions

592. Overseas Bechtel seeks compensation in the amount of USD 1,414,550 for loss of profits. The claim is for loss of anticipated profits (i.e., profits expected to be earned during the period 2 August 1990 to 22 July 1991) resulting from the early termination of the TSA. Overseas Bechtel states that its claim relates to the profit and overhead anticipated by Overseas Bechtel in respect of the TSA from 2 August 1990 to 22 July 1991.

593. The amount claimed is based on the calculation of average payroll values prior to 2 August 1990 using the multipliers and additives set forth in the TSA.

594. Overseas Bechtel limited its claim to a one year period, "even though the Project and Overseas Bechtel's involvement would have continued beyond that time frame".

2. Analysis and valuation

595. In support of its claim, Overseas Bechtel provided a schedule of loss of profits. The schedule sets out the total charges and "multiplier values" for its United States employees in relation to "home office", "project office" and "project site" for the six fourteen pay periods

between 13 May and 22 July 1990. Despite a request to provide copies of the audited financial statements and other financial information in respect of its Iraqi operations, Overseas Bechtel provided only a summary of its unaudited balance sheets for a six year period. The Panel finds that the evidence provided by Overseas Bechtel is insufficient to enable it to calculate the expected profits on the project with any reasonable certainty. Overseas Bechtel failed to demonstrate that its work under the TSA would have been profitable as a whole.

596. The Panel finds that Overseas Bechtel failed to fulfil the evidentiary standard for loss of profits claims set out in paragraphs 125 to 131 of the Summary. Accordingly, the Panel recommends no compensation.

3. Recommendation

597. The Panel recommends no compensation for loss of profits.

C. Payment and relief to others

1. Facts and contentions

598. Overseas Bechtel seeks compensation in the amount of USD 1,275,693 for payment or relief to others. The claim is for: (a) payroll costs incurred between August 1990 and January 1991 relating to Overseas Bechtel's employees who were evacuated from Iraq (USD 1,006,735); and (b) reimbursement of payments made to employees upon their return to their home countries for loss of personal assets (USD 268,958).

599. The total number of Bechtel group employees detained in Iraq before being evacuated between 2 August and 11 December 1990 exceeded 100. However, only 24 of those detained individuals were Overseas Bechtel employees working on the PC-2 Project. Overseas Bechtel's claim relates to payments made to those 24 employees.

600. Overseas Bechtel provided a statement, dated 6 February 1992, by an employee, who was the senior representative of the Bechtel group of companies in Iraq during the period of detention of Overseas Bechtel's staff. The statement contains an account of the circumstances of the detention of Overseas Bechtel's staff. A list of employees and their dependants who were in Iraq as at 2 August 1990 is attached to the statement.

601. The statement indicates that extensive repatriation of Overseas Bechtel's employees from Iraq had taken place by 8 December 1990. On 9 December 1990, all the remaining United States and Canadian employees left Baghdad followed by the remaining United Kingdom employees on 10 December 1990. The author of the statement was the last of the employees to depart Iraq on 11 December 1990.

2. Analysis and valuation

(a) Payroll costs to employees

602. Overseas Bechtel states that "during the illegal detention of its employees in Iraq, Overseas Bechtel continued to pay their remuneration and other contractual benefits, including payroll, vacation pay-off and other expenditure totalling USD 1,006,734.85".

603. In support of its claim, Overseas Bechtel provided a "Schedule of post 2 August 1990 salary costs et al". The schedule sets out salary costs totalling USD 1,006,735 for Overseas Bechtel's United States employees detained in Iraq for the months August 1990 to January 1991 (inclusive). The salary costs are supported by payroll records for the relevant months.

604. The Panel finds that the payroll costs of Overseas Bechtel's employees are compensable in principle. However, given that the last Overseas Bechtel employee departed Iraq on 11 December 1990, it is unclear to the Panel why Overseas Bechtel is claiming for salary costs to January 1991 (inclusive) for its employees. The Panel finds that an adjustment of the December 1990 payroll should be made to reflect the extensive repatriation of Overseas Bechtel's employees that had taken place by 8 December 1990.

605. The Panel is of the opinion that an adjustment to the August 1990 payroll should be made to take account of amounts invoiced to Techcorp for that month. After making the necessary adjustments, the Panel recommends compensation in the amount of USD 786,123 for payroll costs of employees.

(b) Payments to employees for loss of personal assets

606. In its claim, Overseas Bechtel stated that it seeks compensation "for payments to detained employees to reimburse their lost personal effects totalling USD 268,958.41". Some further detail is contained in an inter-office memorandum dated 3 April 1991. The first paragraph reads as follows:

> "When we were able to evacuate employees from Iraq it was done in the quickest manner possible. For this reason, employees were only able to remove from the country those personal effects (if any) in their immediate possession at the time of evacuation. As a result, most employees lost anywhere from a small portion to all of their personal effects. These effects were not covered by insurance since the employees were in a war zone".

607. In support of its claim, Overseas Bechtel provided copies of internal office memoranda authorising the transfer of funds. However, it did not demonstrate the actual transfer of funds. It did not provide copies of reimbursement cheques or payment vouchers.

608. The Panel finds that Overseas Bechtel provided insufficient evidence of its losses and recommends no compensation for payments to employees for loss of personal assets.

3. Recommendation

609. The Panel recommends compensation in the amount of USD 786,123 for payment and relief to others.

D. Overseas Bechtel's insurance recovery

610. Overseas Bechtel states that, in conjunction with other Bechtel group companies, it sought to recover some of its losses under the Bechtel group insurance policies. A total amount of USD 6,959,349 was recovered in respect of all of the Bechtel group's losses. Overseas Bechtel states that, of this amount, the sum of USD 3,100,000 was allocated to it.

611. Overseas Bechtel provided a statement dated 10 February 1994 made by the Risk Management Supervisor of the Bechtel Group Inc. The statement confirms that, of the total amount paid out to the various Bechtel entities, USD 3,100,000 was allocated to Overseas Bechtel for "losses incurred by Overseas Bechtel Inc. on the PC-2 Project."

612. Overseas Bechtel calculated the net amount of its claim by deducting USD 3,100,000 from the gross amount of its asserted losses. This is the correct approach and the Panel has followed it in reaching its conclusion.

E. Summary of recommended compensation for Overseas Bechtel

613. Based on the Panel's findings regarding Overseas Bechtel's claim, the following is the calculation:

Table 13. Recommended compensation for Overseas Bechtel

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	5,325,737	1,086,686
Loss of profits	1,414,550	nil
Payment or relief to others	1,275,693	786,123
Less insurance recovery	(3,100,000)	(3,100,000)
Total	4,915,980	nil

614. The Panel recommends no compensation.

XIX. CORRECTION OF FOURTH INSTALMENT CLAIM

615. In accordance with procedures set out in article 41 of the Rules for the correction of recommended amounts of compensation previously included in reports and recommendations of panels of Commissioners and approved by the Governing Council, the Panel, on the initiative of the Executive Secretary, recommends approval of the corrected recommended amount for the fourth instalment of "E3" claims as set out below.

616. In the Report and Recommendations Made by the Panel of Commissioners Concerning the Fourth Instalment of "E3" Claims (S/AC.26/1999/14) (the "Fourth Report"), the Panel recommended compensation in the amount of USD 2,824,426 for the claimant Dodsal Pte. Ltd. ("Dodsal"), a corporation existing under the laws of Singapore (UNCC Claim Number 4001472). (See the Fourth Report, paragraphs 631 to 656). It has since become apparent to the Panel that an inadvertent calculation error occurred in the amount of DEM 508,978 in respect of Dodsal's claim for unpaid invoices. As a result, and applying the currency exchange rate utilised by the Panel in the Fourth Report, the Panel recommends that the amount of compensation awarded by Dodsal be increased by USD 325,850, which will result in a total recommended award of USD 3,150,276 for Dodsal.

XX. SUMMARY OF RECOMMENDED COMPENSATION BY CLAIMANT

Table 14. Recommended compensation for the tenth instalment

Claimant	Claim amount (USD)	Recommended compensation (USD)
Consortium constituted by Abay Engineering S.A. and Spie Batignolles	12,168,700	nil
Sissa Construction and Management Corporation	159,718,942	nil
Alexandria Shipyard Company	15,356,626	nil
Misr Concrete Development Company	24,864,614	nil
Technip S.A.	44,542,630	4,921,519
Enterprise Muller Freres - Travaux Publics S.A.	1,552,629	nil
ABB Schaltanlagen GmbH	16,635,422	nil
Irbid District Electricity Company	1,444,824	nil
Jordan Electric Power Company	2,363,213	nil
The Jordanian Electrical and Mechanical Engineering Company	228,670	nil
Atlantic Gulf and Pacific Company of Manila, Inc.	288,817	2,880
Polimex-Cekop Limited	51,683,454	395,514
Bechtel Limited	10,013,427	3,082,085
Davy McKee (London) Limited	3,047,678	1,705,911
ABB Lummus Crest Inc.	30,230,415	6,962,766
John Brown, a division of Trafalgar House, Inc.	10,065,777	nil
Overseas Bechtel, Inc.	4,915,980	nil

Geneva, 21 June 2000

(Signed) Pierre Genton
Commissioner

(Signed) Vinayak Pradhan
Commissioner

(Signed) John Tackaberry
Chairman

Annex I

SUMMARY OF GENERAL PROPOSITIONS

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Introduction

1. In the Report and Recommendations Made by the Panel of Commissioners Concerning the Fourth Instalment of "E3" Claims (S/AC.26/1999/14) (the "Fourth Report"), this Panel set out some general propositions based on those claims which had come before it and the findings of other panels of Commissioners contained in their reports and recommendations. Those propositions, as well as some observations specific to the claims in the fourth instalment of "E3" claims, are to be found in the introduction to the Fourth Report (the "Preamble").

2. The Fourth Report was approved by the Governing Council in its decision 74 (S/AC.26/Dec.74 (1999)); and the claims that this Panel has subsequently encountered continue to manifest the same or similar issues. Accordingly, the Panel has revised the Preamble, so as to delete the specific comments, and thus present this Summary of General Propositions (the "Summary"). The Summary is intended to be annexed to, and to form part of, the reports and recommendations made by this Panel. The Summary should facilitate the drafting, and reduce the size, of this Panel's future reports, since it will not be necessary to set matters out in extenso in the body of each report.

3. As further issues are resolved, they may be added at the end of future editions of this Summary.

4. In this Summary, the Panel wishes to record:

(a) the procedure involved in evaluating the claims put before it and in formulating recommendations for the consideration of the Governing Council; and

(b) its analyses of the recurrent substantive issues that arise in claims before the Commission relating to construction and engineering contracts.

5. In deciding to draft this Summary in a format which was separated out from the actual recommendations in the report itself, and in a way that was re-usable, the Panel was motivated by a number of matters. One was the desire to keep the substantive element of its reports to a manageable length. As the number of reports generated by the various panels increases, there seems to be a good deal to be said for what might be called economies of scale. Another matter was the awareness of the Panel of the high costs involved in translating official documents from their original language into each official language of the United Nations. The Panel is concerned to avoid the heavy costs of re-translation of recurrent texts, where the Panel is applying established principles to fresh claims. That re-translation would occur if the reasoning set out in this Summary had been incorporated into the principal text of each report at each relevant point. And, of course, that very repetition of principles seems unnecessary in itself, and this Summary avoids it. In sum, it is the

intention of the Panel to shorten those reports and recommendations, wherever possible, and thereby to reduce the cost of translating them.

I. THE PROCEDURE

A. Summary of the process

6. Each of the claimants whose claims are presented to this Panel is given the opportunity to provide the Panel with information and documentation concerning the claims. In its review of the claims, the Panel considers evidence from the claimants and the responses of Governments to the reports of the Executive Secretary issued pursuant to article 16 of the Provisional Rules for Claims Procedure (S/AC.26/1992/10) (the "Rules"). The Panel has retained consultants with expertise in valuation and in construction and engineering. The Panel has taken note of certain findings by other panels, approved by the Governing Council, regarding the interpretation of relevant Security Council resolutions and Governing Council decisions. The Panel is mindful of its function to provide an element of due process in the review of claims filed with the Commission. Finally, the Panel expounds in this Summary both procedural and substantive aspects of the process of formulating recommendations in its consideration of the individual claims.

B. The nature and purpose of the proceedings

7. The status and functions of the Commission are set forth in the report of the Secretary-General pursuant to paragraph 19 of Security Council resolution 687 (1991) dated 2 May 1991 (S/22559).

8. The Panel is entrusted with three tasks in its proceedings. First, the Panel is required to determine whether the various types of losses alleged by the claimants are within the jurisdiction of the Commission, i.e., whether the losses were caused directly by Iraq's invasion and occupation of Kuwait. Second, the Panel has to verify whether the alleged losses that are in principle compensable have in fact been incurred by a given claimant. Third, the Panel is required to determine whether these compensable losses were incurred in the amounts claimed, and if not, the appropriate quantum for the loss based on the evidence before the Panel.

9. In fulfilling these tasks, the Panel considers that the vast number of claims before the Commission and the time limits in the Rules necessitate the use of an approach which is itself unique, but the principal characteristics of which are rooted in generally accepted procedures for claim determination, both domestic and international. It involves the employment of well established general legal standards of proof and valuation methods that have much experience behind them. The resultant process is essentially documentary rather than oral, and inquisitorial rather than adversarial. This method both realises and balances the twin objectives of speed and accuracy. It also permits the

efficient resolution of the thousands of claims filed by corporations with the Commission.

C. The procedural history of the "E3" Claims

10. The claims submitted to the Panel are selected by the secretariat of the Commission from among the construction and engineering claims (the ""E3" Claims") on the basis of established criteria. These include the date of filing and compliance by claimants with the requirements established for claims submitted by corporations and other legal entities (the "category "E" claims").

11. Prior to presenting each instalment of claims to the Panel, the secretariat performs a preliminary assessment of each claim included in a particular instalment in order to determine whether the claim meets the formal requirements established by the Governing Council in article 14 of the Rules.

12. Article 14 of the Rules sets forth the formal requirements for claims submitted by corporations and other legal entities. These claimants must submit:

(a) an "E" claim form with four copies in English or with an English translation;

(b) evidence of the amount, type and causes of losses;

(c) an affirmation by the Government that, to the best of its knowledge, the claimant is incorporated in or organized under the law of the Government submitting the claim;

(d) documents evidencing the name, address and place of incorporation or organization of the claimant;

(e) evidence that the claimant was, on the date on which the claim arose, incorporated or organized under the law of the Government which has submitted the claim;

(f) a general description of the legal structure of the claimant; and

(g) an affirmation by the authorized official for the claimant that the information contained in the claim is correct.

13. Additionally, the "E" claim form requires that a claimant submit with its claim a separate statement in English explaining its claim ("Statement of Claim"), supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed losses. The following particulars are requested in the "INSTRUCTIONS FOR CLAIMANTS":

(a) the date, type and basis of the Commission's jurisdiction for each element of loss;

(b) the facts supporting the claim;

(c) the legal basis for each element of the claim; and

(d) the amount of compensation sought and an explanation of how the amount was calculated.

14. If it is determined that a claim does not provide these particulars or does not include a Statement of Claim, the claimant is notified of the deficiencies and invited to provide the necessary information pursuant to article 15 of the Rules (the "article 15 notification"). If a claimant fails to respond to that notification, the claimant is sent a formal article 15 notification.

15. Further, a review of the legal and evidentiary basis of each claim identifies specific questions as to the evidentiary support for the alleged losses. It also highlights areas of the claim in which further information or documentation is required. Consequently, questions and requests for additional documentation are transmitted to the claimants pursuant to article 34 of the Rules (the "article 34 notification"). If a claimant fails to respond to the article 34 notification, a reminder notification is sent to the claimant. Upon receipt of the responses and additional documentation, a detailed factual and legal analysis of each claim is conducted. Communications with claimants are made through their respective governments.

16. It is the experience of the Panel in the claims reviewed by it to date that this analysis usually brings to light the fact that many claimants lodge little material of a genuinely probative nature when they initially file their claims. It also appears that many claimants do not retain clearly relevant documentation and are unable to provide it when asked for it. Indeed, some claimants destroy documents in the course of a normal administrative process without distinguishing between documents with no long term purpose and documents necessary to support the claims that they have put forward. Some claimants carry this to the extreme of having to ask the Commission, when responding to an article 15 or an article 34 notification, for a copy of their own claim. Finally, some claimants do not respond to requests for further information and evidence. The consequence is inevitably that for a large number of loss elements and a smaller number of claimants the Panel is unable to recommend any compensation.

17. The Panel performs a thorough and detailed factual and legal review of the claims. The Panel assumes an investigative role that goes beyond reliance merely on information and argument supplied with the claims as presented. After a review of the relevant information and documentation, the Panel makes initial determinations as to the compensability of the loss

elements of each claim. Next, reports on each of the claims are prepared focusing on the appropriate valuation of each of the compensable losses, and on the question of whether the evidence produced by the claimant is sufficient in accordance with article 35(3) of the Rules.

18. The cumulative effect is one of the following recommendations: (a) compensation for the loss in the full amount claimed; (b) compensation for the loss in a lower amount than that claimed; or (c) no compensation.

II. PROCEDURAL ISSUES

A. Panel recommendations

19. Once a motivated recommendation of a panel is adopted by a decision of the Governing Council, it is something to which this Panel gives great weight.

20. All panel recommendations are supported by a full analysis. When a new claim is presented to this Panel it may happen that the new claim will manifest the same characteristics as the previous claim which has been presented to a prior panel. In that event, this Panel will follow the principle developed by the prior panel. Of course, there may still be differences inherent in the two claims at the level of proof of causation or quantum. Nonetheless the principle will be the same.

21. Alternatively, that second claim will manifest different characteristics to the first claim. In that event, those different characteristics may give rise to a different issue of principle and thus warrant a different conclusion by this Panel to that of the previous panel.

B. Evidence of loss

22. Pursuant to article 35(3) of the Rules, corporate claims must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss. The Governing Council has stated in paragraph 5 of decision 15 that, with respect to business losses, there "will be a need for detailed factual descriptions of the circumstances of the claimed loss, damage or injury" in order to justify a recommendation for compensation (S/AC.26/1992/15).

23. The Panel takes this opportunity to emphasise that what is required of a claimant by article 35(3) of the Rules is the presentation to the Commission of evidence that must go to both causation and quantum. The Panel's interpretation of what is appropriate and sufficient evidence will vary according to the nature of the claim. In implementing this approach, the Panel applies the relevant principles extracted from those within the corpus of principles referred to in article 31 of the Rules.

1. Sufficiency of evidence

24. In the final outcome, claims that are not supported by sufficient and appropriate evidence fail. In the context of the construction and engineering claims that are before this Panel, the most important evidence is documentary. It is in this context that the Panel records a syndrome which it found striking when it addressed the first claims presented to it and which has continued to manifest itself in the claims subsequently encountered. This was the reluctance of claimants to make critical documentation available to the Panel.

25. Imperatively, the express wording of decision 46 of the Governing Council requires that "... claims received in categories 'D', 'E', and 'F' must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss ..." In this same decision, the Governing Council confirmed that "... no loss shall be compensated by the Commission solely on the basis of an explanatory statement provided by the claimant,..." (S/AC.26/Dec.46(1998)).

26. It is also the case that the Panel has power under the Rules to request additional information and, in unusually large or complex cases, further written submissions. Such requests usually take the form of procedural orders. Where such orders are issued, considerable emphasis is placed on this need for sufficient documentary and other appropriate evidence.

27. Thus there is an obligation to provide the relevant documentary evidence both on the first filing of a claim and on any subsequent steps.

28. What is more, the absence of any relevant contemporary record to support a particular claim means that the claimant is inviting the Panel to make an award, often of millions of dollars, on no foundation other than the assertion of the claimant. This would not satisfy the "sufficient evidence" rule in article 35(3) of the Rules and would go against the instruction of the Governing Council contained in decision 46. It is something that the Panel is unable to do.

2. Sufficiency under article 35(3): The obligation of disclosure

29. Next in the context of documentary evidence, this Panel wishes to highlight an important aspect of the rule that claims must be supported by sufficient documentary and other appropriate evidence. This involves bringing to the attention of the Commission all material aspects of the claim, whether such aspects are seen by the claimant as beneficial to, or reductive of, its claims. The obligation is not dissimilar to good faith requirements under domestic jurisdictions.

3. Missing documents: The nature and adequacy of the paper trail

30. The Panel now turns to the question of what is required in order to establish an adequate paper trail.

31. Where documents cannot be supplied, their absence must be explained in a credible manner. The explanation must itself be supported by the appropriate evidence. Claimants may also supply substitute documentation for or information about the missing documents. Claimants must remember that the mere fact that they suffered a loss at the same time as the hostilities in the Persian Gulf were starting or were in process does not mean that the loss was directly caused by Iraq's invasion and occupation of Kuwait. A causative link must be established. It should also be borne in mind that it was not the intention of the Security Council in its resolutions to provide a "new for old" basis of reimbursement of the losses suffered in respect of tangible property. Capital goods depreciate. That depreciation must be taken into account and demonstrated in the evidence filed with the Commission. In sum, in order for evidence to be considered appropriate and sufficient to demonstrate a loss, the Panel expects claimants to present to the Commission a coherent, logical and sufficiently evidenced file leading to the financial claims that they are making.

32. Of course, the Panel recognises that in time of civil disturbances, the quality of proof may fall below that which would be submitted in a peace time situation. Persons who are fleeing for their lives do not stop to collect the audit records. Allowances have to be made for such vicissitudes.

33. Thus the Panel is not surprised that some of the claimants in the instalments presented to it to date seek to explain the lack of documentation by asserting that it is, or was, located in areas of civil disorder or has been lost or destroyed, or, at least, cannot be accessed. But the fact that offices on the ground in the region have been looted or destroyed would not explain why claimants have not produced any of the documentary records that would reasonably be expected to be found at claimants' head offices situated in other countries.

34. The Panel approaches the claims presented to it in the light of the general and specific requirements to produce documents noted above. Where there is a lack of documentation, combined with no or no adequate explanation for that lack, and an absence of alternative evidence to make good any part of that lack, the Panel has no opportunity or basis upon which to make a recommendation.

C. Amending claims after filing

35. In the course of processing the claims after they have been filed with the Commission, further information is sought from the claimants pursuant to the Rules. When the claimants respond they sometimes seek to use the opportunity to amend their claims. For example, they add new loss

elements. They increase the amount originally sought in respect of a particular loss element. They transfer monies between or otherwise adjust the calculation of two or more loss elements. In some cases, they do all of these.

36. The Panel notes that the period for filing category "E" claims expired on 1 January 1996. The Governing Council approved a mechanism for these claimants to file unsolicited supplements until 11 May 1998. After that date a response to an inquiry for additional evidence is not an opportunity for a claimant to increase the quantum of a loss element or elements or to seek to recover in respect of new loss elements. In these circumstances, the Panel is unable to take into account such increases or such new loss elements when it is formulating its recommendations to the Governing Council. It does, however, take into account additional documentation where that is relevant to the original claim, either in principle or in detail. It also exercises its inherent powers to re-characterise a loss, which is properly submitted as to time, but is inappropriately allocated.

37. Some claimants also file unsolicited submissions. These too sometimes seek to increase the original claim in the ways indicated in the previous paragraph. Such submissions when received after 11 May 1998 are to be treated in the same way as amendments put forward in solicited supplements. Accordingly the Panel is unable to, and does not, take into account such amendments when it is formulating its recommendations to the Governing Council.

III. SUBSTANTIVE ISSUES

A. Applicable law

38. As set forth in paragraphs 17 and 18 of the Fourth Report, paragraph 16 of Security Council resolution 687 (1991) reaffirmed the liability of Iraq and defined the jurisdiction of the Commission. Pursuant to article 31 of the Rules, the Panel applies Security Council resolution 687 (1991), other relevant Security Council resolutions, decisions of the Governing Council, and, where necessary, other relevant rules of international law.

B. Liability of Iraq

39. When adopting resolution 687 (1991), the Security Council acted under chapter VII of the Charter of the United Nations which provides for maintenance or restoration of international peace and security. The Security Council also acted under chapter VII when adopting resolution 692 (1991), in which it decided to establish the Commission and the Compensation Fund referred to in paragraph 18 of resolution 687 (1991). Specifically, under resolution 687 (1991), the issue of Iraq's liability for losses falling within the Commission's jurisdiction is resolved and is not subject to review by the Panel.

40. In this context, it is necessary to address the meaning of the term "Iraq". In Governing Council decision 9 (S/AC.26/1992/9) and other Governing Council decisions, the word "Iraq" was used to mean the Government of Iraq, its political subdivisions, or any agency, ministry, instrumentality or entity (notably public sector enterprises) controlled by the Government of Iraq. In the Report and Recommendations Made by the Panel of Commissioners Concerning the Fifth Instalment of "E3" Claims (the "Fifth Report", S/AC.26/1999/2), this Panel adopted the presumption that for contracts performed in Iraq, the other contracting party was an Iraqi Government entity.

C. The "arising prior to" clause

41. The Panel recognises that it is difficult to establish a fixed date for the exclusion of its jurisdiction that does not contain an arbitrary element. With respect to the interpretation of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), the Panel of Commissioners that reviewed the first instalment of "E2" claims concluded that the "arising prior to" clause was intended to exclude the foreign debt of Iraq which existed at the time of Iraq's invasion of Kuwait from the jurisdiction of the Commission. As a result, the "E2" Panel found that:

> "In the case of contracts with Iraq, where the performance giving rise to the original debt had been rendered by a claimant more than three months prior to 2 August 1990, that is, prior to 2 May 1990, claims based on payments owed, in kind or in cash, for such performance are outside of the jurisdiction of the Commission as claims for debts or obligations arising prior to 2 August 1990." (Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of "E2" Claims, S/AC.26/1998/7, paragraph 90)).

42. That report was approved by the Governing Council. Accordingly, this Panel adopts the "E2" Panel's interpretation which is to the following effect:

(a) the phrase "without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through normal mechanisms" was intended to have an exclusionary effect on the Commission's jurisdiction, i.e., such debts and obligations are not compensable by the Commission;

(b) the limitation contained in the clause "arising prior to 2 August 1990" was intended to leave unaffected the debts and obligations of Iraq which existed prior to Iraq's invasion and occupation of Kuwait; and

(c) the terms "debts" and "obligations" should be given the customary and usual meanings applied to them in ordinary discourse.

43. Thus, this Panel accepts that, in general, a claim relating to a "debt or obligation arising prior to 2 August 1990" means a debt or obligation that is based on work performed or services rendered prior to 2 May 1990.

D. Application of the "direct loss" requirement

44. Paragraph 21 of Governing Council decision 7 (S/AC.26/1991/7/Rev.1) is the seminal rule on "directness" for category "E" claims. It provides in relevant part that compensation is available for:

> "... any direct loss, damage, or injury to corporations and other entities as a result of Iraq's unlawful invasion and occupation of Kuwait. This will include any loss suffered as a result of:
>
> (a) Military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991;
>
> (b) Departure of persons from or their inability to leave Iraq or Kuwait (or a decision not to return) during that period;
>
> (c) Actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation;
>
> (d) The breakdown of civil order in Kuwait or Iraq during that period; or
>
> (e) Hostage-taking or other illegal detention."

45. The text of paragraph 21 of decision 7 is not exhaustive and leaves open the possibility that there may be causes of "direct loss" other than those enumerated. Paragraph 6 of decision 15 of the Governing Council (S/AC.26/1992/15) confirms that there "will be other situations where evidence can be produced showing claims are for direct loss, damage or injury as a result of Iraq's unlawful invasion and occupation of Kuwait". Should that be the case, the claimants will have to prove specifically that a loss that was not suffered as a result of one of the five categories of events set out in paragraph 21 of decision 7 is nevertheless "direct". Paragraph 3 of decision 15 emphasises that for any alleged loss or damage to be compensable, the "causal link must be direct". (See also paragraph 9 of decision 9).

46. While the phrase "as a result of" contained in paragraph 21 of decision 7 is not further clarified, Governing Council decision 9 provides guidance as to what may be considered business "losses suffered as a result of" Iraq's invasion and occupation of Kuwait. It identifies the three main categories of loss types in the "E" claims: losses in connection with contracts, losses relating to tangible assets and losses relating to income-producing properties. Thus, decisions 7 and 9 provide specific

guidance to the Panel as to how the "direct loss" requirement must be interpreted.

47. In the light of the decisions of the Governing Council identified above, the Panel has reached certain conclusions as to the meaning of "direct loss". These conclusions are set out in the following paragraphs.

48. With respect to physical assets in Iraq or in Kuwait as at 2 August 1990, a claimant can prove a direct loss by demonstrating two matters. First, that the breakdown in civil order in these countries, which resulted from Iraq's invasion and occupation of Kuwait, caused the claimant to evacuate its employees. Second, as set forth in paragraph 13 of decision 9, that the claimant left physical assets in Iraq or in Kuwait.

49. With respect to losses relating to contracts to which Iraq was a party, force majeure or similar legal principles are not available as a defence to the obligations of Iraq.

50. With respect to losses relating to contracts to which Iraq was not a party, a claimant may prove a direct loss if it can establish that Iraq's invasion and occupation of Kuwait or the breakdown in civil order in Iraq or Kuwait following Iraq's invasion caused the claimant to evacuate the personnel needed to perform the contract.

51. In the context of the losses set out above, reasonable costs which have been incurred to mitigate those losses are direct losses. The Panel bears in mind that the claimant was under a duty to mitigate any losses that could have been reasonably avoided after the evacuation of its personnel from Iraq or Kuwait.

52. These findings regarding the meaning of "direct loss" are not intended to resolve every issue that may arise with respect to this Panel's interpretation of Governing Council decisions 7 and 9. Rather, these findings are intended as initial parameters for the review and evaluation of the claims.

53. Finally, there is the question of the geographical extent of the impact of events in Iraq and Kuwait outside these two countries. Following on the findings of the "E2" Panel in its first report, this Panel finds that damage or loss suffered as a result of (a) military operations in the region by either the Iraqi or the Allied Coalition Forces or (b) a credible and serious threat of military action that was connected to Iraq's invasion and occupation of Kuwait is compensable in principle. Of course, the further the project in question was from the area where military operations were taking place, the more the claimant may have to do to establish causality. On the other hand, the potential that an event such as the invasion and occupation of Kuwait has for causing an extensive ripple effect cannot be ignored. Each case must depend on its facts.

E. Date of loss

54. There is no general principle with respect to the date of loss. It needs to be addressed on an individual basis. In addition, the specific loss elements of each claim may give rise to different dates if analysed strictly. However, applying a different date to each loss element within a particular claim is impracticable as a matter of administration. Accordingly, the Panel has decided to determine a single date of loss for each claimant, which, in most cases, coincides with the date of the collapse of the project.

F. Currency exchange rate

55. While many of the costs incurred by the claimants were denominated in currencies other than United States dollars, the Commission issues its awards in that currency. Therefore the Panel is required to determine the appropriate rate of exchange to apply to losses expressed in other currencies.

56. The Panel finds that, as a general rule, where an exchange rate is set forth in the contract then that is the appropriate rate for losses under the relevant contracts because this was specifically agreed by the parties.

57. For losses that are not contract based, however, the contract rate is not usually an appropriate rate of exchange. For non-contractual losses, the Panel finds the appropriate exchange rate to be the prevailing commercial rate, as evidenced by the United Nations Monthly Bulletin of Statistics, at the date of loss.

G. Interest

58. On the issue of the appropriate interest rate to be applied, the relevant Governing Council decision is decision 16 (S/AC.26/1992/16). According to that decision, "[i]nterest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award". In decision 16 the Governing Council further specified that "[i]nterest will be paid after the principal amount of awards", while postponing any decision on the methods of calculation and payment.

59. Accordingly, the Panel recommends that interest shall run from the date of loss.

H. Claim preparation costs

60. Some claimants seek to recover compensation for the cost of preparing their claims. The compensability of claim preparation costs has not hitherto been ruled on and will be the subject, in due course, of a specific decision by the Governing Council. Therefore, this Panel has made

and will make no recommendations with respect to claim preparation costs in any of the claims where they have been raised.

I. Contract losses

1. Claims for contract losses with non-Iraqi party

61. Some of the claims relate to losses suffered as a result of non-payment by a non-Iraqi party. The fact of such a loss, simpliciter, does not establish it as a direct loss within the meaning of Security Council resolution 687 (1991). In order to obtain compensation, a claimant must lodge sufficient evidence that the entity with which it carried on business on 2 August 1990 was unable to make payment as a direct result of Iraq's invasion and occupation of Kuwait.

62. A good example of this would be that the party was insolvent and that the insolvency was a direct result of Iraq's invasion and occupation of Kuwait. At the very least a claimant should demonstrate that the other party had not renewed operations after the end of the occupation. In the event that there are multiple factors which have resulted in the failure to resume operations, apart from the proved insolvency of the other party, the Panel will have to be satisfied that the effective reason or causa causans was Iraq's invasion and occupation of Kuwait.

63. Any failure to pay because the other party was excused from performance by the operation of law which came into force after Iraq's invasion and occupation of Kuwait is in the opinion of this Panel the result of a novus actus interveniens and is not a direct loss arising out of Iraq's invasion and occupation of Kuwait.

2. Advance payments

64. Many construction contracts provide for an advance payment to be made by the employer to the contractor. These advance payments are often calculated as a percentage of the initial price (initial, because many such contracts provide for automatic and other adjustments of the price during the execution of the works). The purpose of the advance payment is to facilitate certain activities which the contractor will need to carry out in the early stages.

65. Mobilisation is often one such activity. Plant and equipment may need to be purchased. A workforce will have to be assembled and transported to the work site, where facilities will be needed to accommodate it. Another such activity is the ordering of substantial or important materials which are in short supply and may, therefore, be available only at a premium or at a long lead time.

66. Advance payments are usually secured by a bond provided by the contractor, and are usually paid upon the provision of the bond. They are frequently repaid over a period of time by way of deduction by the employer

from the sums which are payable at regular intervals (often monthly) to the contractor for work done. See, in the context of payments which are recovered over a period of time, the observations about amortisation at paragraph 120, infra. Those observations apply mutatis mutandis to the repayment of advance payments.

67. The Panel notes that some claimants presenting claims have not clearly accounted for the amounts of money already paid to them by the employer. This Panel regularly sees evidence of advance payments amounting to tens of millions of United States dollars. Where advance payments have been part of the contractual arrangements between the claimant and the employer, the claimant must account for these payments in reduction of its claims, unless these payments can be shown to have been recouped in whole or in part by the employer. Where no explanation or proof of repayment is forthcoming, the Panel has no option but to conclude that these amounts paid in advance are due, on a final accounting, to the employer, and must be deducted from the claimant's claim.

3. Contractual arrangements to defer payments

(a) The analysis of "old debt"

68. Where payments are deferred under the contracts upon which the claims are based, an issue arises as to whether the claimed losses are "debts and obligations arising prior to 2 August 1990" and therefore outside the jurisdiction of the Commission.

69. In its first report, the "E2" Panel interpreted Security Council resolution 687 (1991) as intending to eliminate what may be conveniently called "old debt". In applying this interpretation to the claim before it the "E2" Panel identified, as "old debt", cases where the performance giving rise to the original debt had been rendered by a claimant more than three months prior to 2 August 1990, that is, prior to 2 May 1990. In those cases, claims based on payments owed, in kind or in cash, for such performance are outside the jurisdiction of the Commission as claims for debts or obligations arising prior to 2 August 1990. "Performance" as understood by the "E2" Panel for the purposes of this rule meant complete performance under a contract, or partial performance, so long as an amount was agreed to be paid for that portion of completed partial performance. In the claim the "E2" Panel was considering, the work under the contract was clearly performed prior to 2 May 1990. However, the debts were covered by a form of deferred payments agreement dated 29 July 1984. This agreement was concluded between the parties to the original contracts and postdated the latter.

70. In its analysis, the "E2" Panel found that deferred payments arrangements go to the very heart of what the Security Council described in paragraph 16 of resolution 687 as a debt of Iraq arising prior to 2 August 1990. It was this very kind of obligation which the Security Council had

in mind when, in paragraph 17 of resolution 687 (1991), it directed Iraq to "adhere scrupulously" to satisfying "all of its obligations concerning servicing and repayment". Therefore, irrespective of whether such deferred payment arrangements may have created new obligations on the part of Iraq under a particular applicable municipal law, they did not do so for the purposes of resolution 687 (1991) and are therefore outside the jurisdiction of this Commission.

71. The arrangements that the "E2" Panel was considering were not arrangements that arose out of genuine arms' length commercial transactions, entered into by construction companies as part and parcel of their normal businesses. Instead the situation which the "E2" Panel was addressing was described as follows:

> "The negotiation of these deferred payment arrangements was typically conducted with Iraq not by the contractor or supplier itself, but rather by its Government. Typically, the Government negotiated on behalf of all of the contracting parties from the country concerned who were in a similar situation. The deferred payment arrangements with Iraq were commonly entered into under a variety of forms, including complicated crude oil barter arrangements under which Iraq would deliver certain amounts of crude oil to a foreign State to satisfy consolidated debts; the foreign State then would sell the oil and, through its central bank, credit particular contractors' accounts." (S/AC.26/1998/7, paragraph 93).

> "Iraq's debts were typically deferred by contractors who could not afford to "cut their losses" and leave, and thus these contractors continued to work in the hope of eventual satisfaction and continued to amass large credits with Iraq. In addition, the payment terms were deferred for such long periods that the debt servicing costs alone had a significant impact on the continued growth of Iraq's foreign debt." (S/AC.26/1998/7, paragraph 94).

72. This Panel agrees.

(b) Application of the "old debt" analysis

73. In the application of this analysis to claims other than those considered by the "E2" Panel, there are two aspects which are worth mentioning.

74. The first is that the problem does not arise where the actual work has been performed after 2 May 1990. The arrangement deferring payment is irrelevant to the issue. The issue typically resolves itself in these cases into one of proof of the execution of the work, the quantum, the non payment and causation.

75. The second concerns the ambit of the above analysis. As noted above, the claims which led to the above analysis arose out of "non-commercial" arrangements. They were situations where the original terms of payment entered into between the parties had been renegotiated during the currency of the contract or the negotiations or renegotiations were driven by inter-governmental exchanges. Such arrangements were clearly the result of the impact of Iraq's increasing international debt.

76. Thus one can see underlying the "E2" Panel's analysis two important factors. The first was the subsequent renegotiation of the payment terms of an existing contract to the detriment of the claimant (contractor). The second was the influence on contracts of the transactions between the respective governments. In both cases, a key element underlying the arrangements must be the impact of Iraq's mountain of old debt.

77. In the view of this Panel, where either of these factors is wholly or partially the explanation of the "loss" suffered by the claimant, then that loss or the relevant part of it is outside the jurisdiction of the Commission and cannot form the basis of recommendation by a panel. It is not necessary that both factors be present. A contract that contained deferment provisions as originally executed would still be caught by the "arising prior to" rule if the contract was the result of an inter-governmental agreement driven by the exigencies of Iraq's financial problems. It would not be a commercial transaction so much as a political agreement, and the "loss" would not be a loss falling within the jurisdiction of the Commission.

4. Losses arising as a result of unpaid retention monies

78. The claims before this Panel include requests for compensation for what could be described as another form of deferred payment, namely unpaid retention monies.

79. Under many if not most construction contracts, provision is made for the regular payment to the contractor of sums of money during the performance of the work under the contract. The payments are often monthly, and often calculated by reference to the amount of work that the contractor has done since the last regular payment was calculated.

80. Where the payment is directly related to the work done, it is almost invariably the case that the amount of the actual (net) payment is less than the contractual value of the work done. This is because the employer retains in his own hands a percentage (usually 5 per cent or 10 per cent and with or without an upper limit) of that contractual value. (The same approach usually obtains as between the contractor and his subcontractors.) The retained amount is often called the "retention" or the "retention fund". It builds up over time. The less work the contractor carries out before the project comes to an early halt, the smaller the fund.

81. The retention is usually payable in two stages, one at the commencement of the maintenance period, as it is often called, and the other at the end. The maintenance period usually begins when the employer first takes over the project, and commences to operate or use it. Thus the work to which any particular sum which is part of the retention fund relates may have been executed a very long time before the retention fund is payable.

82. Retention fund provisions are very common in the construction world. The retention fund serves two roles. It is an encouragement to the contractor to remedy defects appearing before or during the maintenance period. It also provides a fund out of which the employer can reimburse itself for defects that appear before or during the maintenance period which the contractor has, for whatever reason, failed or refused to make good.

83. In the claims before this Panel, events - in the shape of Iraq's invasion and occupation of Kuwait - have intervened. The contract has effectively come to an end. There is no further scope for the operation of the retention provisions. It follows that the contractor, through the actions of Iraq, has been deprived of the opportunity to recover the money. In consequence the claims for retention fall within the jurisdiction of the Commission.

84. In the light of the above considerations it seems to this Panel that the situation in the case of claims for retention is as follows:

(a) The evidence before the Commission may show that the project was in such trouble that it would never have reached a satisfactory conclusion. In such circumstances, there can be no positive recommendation, principally because there is no direct causative link between the loss and the invasion and occupation of Kuwait.

(b) Equally the evidence may show that the project would have reached a conclusion, but that there would have been problems to resolve. Accordingly the contractor would have had to expend money resolving those problems. That potential cost would have to be deducted from the claim for retention; and accordingly the most convenient course would be to recommend an award to the contractor of a suitable percentage of the unpaid retention.

(c) Finally, on the evidence it may be the case that there is no reason to believe or conclude that the project would have gone other than satisfactorily. In those circumstances, it seems that the retention claim should succeed in full.

5. Guarantees, bonds, and like securities

85. Financial recourse agreements are part and parcel of a major construction contract. Instances are (a) guarantees - for example given by

parent companies or through banks; (b) what are called "on demand" or "first demand" bonds (hereinafter "on demand bonds") which support such matters as bidding and performance; and (c) guarantees to support advance payments. (Arrangements with government sponsored bodies that provide what might be called "fall-back" insurance are in a different category. As to these, see paragraphs 95 to 102, infra).

86. Financial recourse arrangements give rise to particular problems when it comes to determining the claims filed in the population of construction and engineering claims. A convenient and stark example is that of the on demand bond.

87. The purpose of an on demand bond is to permit the beneficiary to obtain monies under the bond without having to prove default on the part of the other party - namely, in the situations under discussion here, the contractor executing the work. Such a bond is often set up by way of a guarantee given by the contractor or its parent to its own bank in its home State. That bank gives an identical bond to a bank (the second bank) in the State of the employer under the construction contract. In its turn, the second bank gives an identical bond to the employer. This leaves the employer, at least theoretically, in the very strong position of being able, without having to prove any default on the part of the contractor, to call down a large sum of money which will be debited to the contractor.

88. Of course, the contractor's bank will have two arrangements in place. First, an arrangement whereby it is secured as to the principal sum, the subject of the bond, in case the bond is called. Second, it will have arranged to exact a service charge, typically raised quarterly, half-yearly or annually.

89. Many claimants have raised claims in respect of the service charges; and also in respect of the principal sums. The former are often raised in respect of periods of years measured from the date of Iraq's invasion and occupation of Kuwait. The latter have, hitherto at least, been cautionary claims, in case the bonds are called in the future.

90. This Panel approaches this issue by observing that the strength of the position given to the employer by the on demand bond is sometimes more apparent than real. This derives from the fact that the courts of some countries are reluctant to enforce payment of such bonds if they feel that there is serious abuse by the employer of its position. For example, where there is a persuasive allegation of fraud, some courts will be prepared to injunct the beneficiary from making a call on the bond, or one or other of the banks from meeting the demand. It is also the case that there may be remedies for the contractor in some jurisdictions when the bonds are called in circumstances that are clearly outside the original contemplation of the parties.

91. The Panel notes that most if not all contracts for the execution of major construction works by a contractor from one country in the territory of another country will have clauses to deal with war, insurrection or civil disorder. Depending on the approach of the relevant governing law to such matters, these provisions, if triggered, may have a direct or indirect effect on the validity of the bond. Direct, if under the relevant legal regime, the effects of the clause in the construction contract apply also to the bond; indirect if the termination or modification of the underlying obligation (the construction contract) gives rise to the opportunity to seek a forum-driven modification or termination of the liabilities under the bond.

92. In addition, the simple passage of time is likely to give rise to the right to treat the bond obligation as expired or unenforceable, or to seek a forum-driven resolution to the same effect.

93. In sum, and in the context of Iraq's invasion and occupation of Kuwait and the time which has passed since then, it seems to this Panel that it is highly unlikely that on demand bond obligations of the sort this Panel has seen in the instalments it has addressed are alive and effective.

94. If that analysis is correct, then it seems to this Panel that claims for service charges on these bonds will only be sustainable in very unusual circumstances. Equally, claims for the principal will only be sustainable where the principal has in fact been irrevocably paid out and where the beneficiary of the bond had no factual basis to make a call upon the bond.

6. Export credit guarantees

95. Arrangements with government sponsored bodies that provide what might be called "fall-back" insurance are in a different case to guarantees generally. These forms of financial recourse have names such as "credit risk guarantees". They are in effect a form of insurance, often underwritten by the government of the territory in which the contractor is based. They exist as part of the economic policy of the government in question, in order to encourage trade and commerce by its nationals abroad.

96. Such guarantees often have a requirement that the contractor must exhaust all local remedies before calling on the guarantee; or must exhaust all possible remedies before making a call.

97. Claims have been made by parties for:

(a) reimbursement of the premia paid to obtain such guarantees; and also for

(b) shortfalls between the amounts recovered under such guarantees and the losses said to have been incurred.

In the view of this Panel, one of these types of claim is misconceived; and the other is mis-characterised.

98. A claim for the premia is misconceived. A premium paid for any form of insurance is not recoverable unless the policy is avoided. Once the policy is in place, either the event that the policy is intended to embrace occurs, or it does not. If it does, then there is a claim under the policy. If it does not then there is no such claim. In neither case does it seem to the Panel that the arrangements - prudent and sensible as they are - give rise to a claim for compensation for the premia. There is no "loss" properly so called or any causative link with Iraq's invasion and occupation of Kuwait.

99. Further, where a contractor has in fact been indemnified in whole or in part by such a body in respect of losses incurred as a result of Iraq's invasion and occupation of Kuwait, there is, to that extent, no longer any loss for which that contractor can claim to the Commission. Its loss has been made whole.

100. The second situation is that where a contractor claims for the balance between what are said to be losses incurred as a result of Iraq's invasion and occupation of Kuwait and what has been recovered from the guarantor.

101. Here the claim is mis-characterised. That balance may indeed be a claimable loss; but its claimability has nothing to do with the fact that the monies represent a shortfall between what has been recovered under the guarantee and what has been lost. Instead, the correct analysis should start from a review of the cause of the whole of the loss of which the balance is all that remains. The first step is to establish whether there is evidence to support that whole sum, that it is indeed a sum that the claimant has paid out or failed to recover; and that there is the necessary causation. To the extent that the sum is established, then to that extent the claim is prima facie compensable. However, so far as there has been reimbursement by the guarantor, the loss has been made good, and there is nothing left to claim for. It is only if there is still some qualifying loss, not made good, that there is room for a recommendation of this Panel.

102. Finally, there are the claims by the bodies granting the credit guarantees who have paid out sums of money. They entered into an insurance arrangement with the contractor. In consideration of that arrangement, they required the payment of premia. As before, either the event covered by the insurance occurred or it did not. In the former case, the Panel would have thought that the guarantor was contractually obliged to pay out; and in the latter case, not so. Whether any payments made in these circumstances give rise to a compensable claim is not a matter for this Panel. Such claims come within the population of claims allocated to the "E/F" Panel.

7. Frustration and force majeure clauses

103. Construction contracts, both in common law and under the civil law, frequently contain provisions to deal with events that have wholly changed the nature of the venture. Particular events which are addressed by such clauses include war, civil strife and insurrection. Given the length of time that a major construction project takes to come to fruition and the sometimes volatile circumstances, both political and otherwise, in which such contracts are carried out, this is hardly surprising. Indeed, it makes good sense. The clauses make provision as to how the financial consequences of the event are to be borne; and what the result is to be so far as the physical project is concerned.

104. Such clauses give rise to two questions when it comes to the population of claims before this Panel. The first question is whether Iraq is entitled to invoke such clauses to reduce its liability. The second is whether claimants may utilise such clauses to support or enhance their recovery from the Commission.

105. As to the first question, the position seems to this Panel to be as follows. In the population of claims before the Commission, the frustrating or force majeure event will nearly always be the act or omission of Iraq itself. However, such a clause is designed to address events which, if they occurred at all, were anticipated to be wholly outside the control of both parties. It would be quite inappropriate for the causal wrongdoer to rely on such clause to reduce the consequences of its own wrongdoing.

106. But the second question then arises as to whether claimants can rely upon such clauses. An example of such reliance would be where the clause provides for the acceleration of payments which otherwise would not have fallen due. As to this question, one example of this sort of claim has been addressed and the answer categorically spelt out in the first report of the "E2" Panel as follows:

> "Second, [the Claimants] direct the Commission's attention to the clauses relating to "frustration" in the respective underlying contracts. The Claimants assert that in the case of frustration of contract, these clauses accelerate the payments due under the contract, in effect giving rise to a new obligation on the part of Iraq to pay all the amounts due and owing under the contract regardless of when the underlying work was performed. The Panel has concluded that claimants may not invoke such contractual agreements or clauses before the Commission to avoid the "arising prior to" exclusion established by the Security Council in resolution 687 (1991); consequently, this argument must fail." (S/AC.26/1998/7, paragraph 188).

107. The situation described above was one where the work that was the subject of the claim had been performed prior to Iraq's invasion and

occupation of Kuwait, and, therefore, fell clearly foul of the "arising prior to" rule. However, the claimants, who had agreed on arrangements for delayed payment, sought to rely on the frustration clause to get over this problem. The argument was, as this Panel understands it, that the frustration clause was triggered by the events which had in fact occurred, namely Iraq's invasion and occupation of Kuwait. The frustration clause provided for the accelerated payment of sums due under the contract. Payment of the sums had originally been deferred to dates which were still in the future at the time of the invasion and occupation; but the frustrating event meant that they became due during the time of, or indeed at the beginning of, Iraq's invasion and occupation of Kuwait. Accordingly, the payments had, in the event, become due within the period covered by the jurisdiction established by Security Council resolution 687 (1991). Therefore, a claim for the reimbursement of these payments could be entertained by the "E2" Panel.

108. It was this claim that the "E2" Panel rejected. This Panel agrees.

109. There remains the situation where the frustration clause is being used by claimants to enhance a claim, other than by way of circumventing the "arising prior to" rule, for example, where the acceleration delivered by the frustration clause is put forward to seek to bring into the period within the jurisdiction of the Commission payments which would otherwise have been received, under the contract, well after the liberation of Kuwait, and therefore would not otherwise be compensable.

110. In the view of this Panel, such claims would similarly fail. In this case, as in the case addressed by the "E2" Panel, claimants are seeking to use the provisions of private contracts to enhance the jurisdiction granted by Security Council resolution 687 (1991) and defined by jurisprudence developed by the Commission. That is not an appropriate course. It is not open to individual entities by agreement or otherwise, to modify the jurisdiction of the Commission.

J. Claims for overhead and "lost profits"

1. General

111. Any construction project can be broken down into a number of components. All of these components contribute to the pricing of the works. In this Panel's view, it is helpful for the examination of these kinds of claims to begin by rehearsing in general terms the way in which many contractors in different parts of the world construct the prices that ultimately appear in the construction contracts they sign. Of course, there is no absolute rule as to this process. Indeed, it is unlikely that any two contractors will assemble their bids in exactly the same way. But the constraints of construction work and the realities of the financial world impose a general outline from which there will rarely be a substantial deviation.

112. Many of the construction contracts encountered in the claims submitted to this Panel contain a schedule of rates or a "bill of quantities". This document defines the amount to be paid to the contractor for the work performed. It is based on previously agreed rates or prices. The final contract price is the aggregate value of the work calculated at the quoted rates together with any variations and other contractual entitlements and deductions which increase or decrease the amount originally agreed.

113. Other contracts in the claims submitted to this Panel are lump sum contracts. Here the schedule of rates or bill of quantities has a narrower role. It is limited to such matters as the calculation of the sums to be paid in interim certificates and the valuation of variations.

114. In preparing the schedule of rates, the contractor will plan to recover all of the direct and indirect costs of the project. On top of this will be an allowance for the "risk margin". In so far as there is an allowance for profit it will be part of the "risk margin". However, whether or not a profit is made and, if made, in what amount, depends obviously on the incidence of risk actually incurred.

115. An examination of actual contracts combined with its own experience of these matters has provided this Panel with guidelines as to the typical breakdown of prices that may be anticipated on construction projects of the kind relevant to the claims submitted to this Panel.

116. The key starting point is the base cost - the cost of labour, materials and plant - in French the "prix secs". In another phrase, this is the direct cost. The direct cost may vary, but usually represents 65 to 75 per cent of the total contract price.

117. To this is added the indirect cost - for example the supply of design services for such matters as working drawings and temporary works by the contractor's head office. Typically, this indirect cost represents about 25 to 30 per cent of the total contract price.

118. Finally, there is what is called the "risk margin" - the allowance for the unexpected. The risk margin is generally in the range of between barely above zero and five per cent of the total contract price. The more smoothly the project goes, the less the margin will have to be expended. The result will be enhanced profits, properly so called, recovered by the contractor at the end of the day. The more the unexpected happens and the more the risk margin has to be expended, the smaller the profit will ultimately be. Indeed, the cost of dealing with the unexpected or the unplanned may equal or exceed the risk margin, leading to a nil result or a loss.

119. In the view of the Panel, it is against this background that some of the claims for contract losses need to be seen.

2. Head office and branch office expenses

120. These are generally regarded as part of the overhead. These costs can be dealt with in the price in a variety of ways. For example, they may be built into some or all of the prices against line items; they may be provided for in a lump sum; they may be dealt with in many other ways. One aspect, however, will be common to most, if not all, contracts. It will be the intention of the contractor to recover these costs through the price at some stage of the execution of the contract. Often the recovery has been spread through elements of the price, so as to result in repayment through a number of interim payments during the course of the contract. Where this has been done, it may be said that these costs have been amortised. This factor is relevant to the question of double-counting (see paragraph 123, infra).

121. If therefore any part of the price of the works has been paid, it is likely that some part of these expenses has been recovered. Indeed, if these costs have been built into items which are paid early, a substantial part or even all of these costs may have been recovered.

122. If these items were the subject of an advance payment, again they may have been recovered in their entirety at an early stage of the project. Here of course there is an additional complication, since the advance payments will be credited back to the employer - see paragraph 66, supra - during the course of the work. In this event, the Panel is thrown back onto the question of where in the contractor's prices payment for these items was intended to be.

123. In all of these situations, it is necessary to avoid double-counting. By this the Panel means the situation where the contractor is specifically claiming, as a separate item, elements of overhead which, in whole or in part, are already covered by the payments made or claims raised for work done.

124. The same applies where there are physical losses at a branch or indeed a site office or camp. These losses are properly characterised, and therefore claimable, if claimable at all, as losses of tangible assets.

3. Loss of profits on a particular project

125. Governing Council decision 9, paragraph 9, provides that where "continuation of the contract became impossible for the other party as a result of Iraq's invasion and occupation of Kuwait, Iraq is liable for any direct loss the other party suffered as a result, including lost profits".

126. As will be seen from the observations at paragraphs 111 to 119, supra, the expression "lost profits" is an encapsulation of quite a complicated concept. In particular, it will be appreciated that achieving profits or suffering a loss is a function of the risk margin and the actual event.

127. The qualification of "margin" by "risk" is an important one in the context of construction contracts. These contracts run for a considerable period of time; they often take place in remote areas or in countries where the environment is hostile in one way or another; and of course they are subject to political problems in a variety of places - where the work is done, where materials, equipment or labour have to be procured, and along supply routes. The surrounding circumstances are thus very different and generally more risk prone than is the case in the context of, say, a contract for the sale of goods.

128. In the view of this Panel it is important to have these considerations in mind when reviewing a claim for lost profits on a major construction project. In effect one must review the particular project for what might be called its "loss possibility". The contractor will have assumed risks. He will have provided a margin to cover these risks. He will have to demonstrate a substantial likelihood that the risks would not occur or would be overcome within the risk element so as to leave a margin for actual profit.

129. This approach, in the view of this Panel, is inherent in the thinking behind paragraph 5 of Governing Council decision 15. This paragraph expressly states that a claimant seeking compensation for business losses such as loss of profits, must provide "detailed factual descriptions of the circumstances of the claimed loss, damage or injury" in order for compensation to be awarded.

130. In the light of the above analysis, and in conformity with the two Governing Council decisions cited above, this Panel requires the following from those construction and engineering claimants that seek to recover for lost profits. First, the phrase "continuation of the contract" imposes a requirement on the claimant to prove that it had an existing contractual relationship at the time of the invasion. Second, the provision requires the claimant to prove that the continuation of the relationship was rendered impossible by Iraq's invasion and occupation of Kuwait. This provision indicates a further requirement that profits should be measured over the life of the contract. It is not sufficient to prove that there would have been a "profit" at some stage before the completion of the project. Such a proof would only amount to a demonstration of a temporary credit balance. This can even be achieved in the early stages of a contract, for example where the pricing has been "front-loaded" for the express purpose of financing the project.

131. Instead, the claimant must lodge sufficient and appropriate evidence to show that the contract would have been profitable as a whole. Such evidence would include projected and actual financial information relating to the relevant project, such as audited financial statements, budgets, management accounts, turnover, original bids and tender sum analyses, time schedules drawn up at the commencement of the works, profit/loss statements, finance costs and head office costs prepared by or on behalf of

the claimant for each accounting period from the first year of the relevant project to March 1993. The claimant should also provide: original calculations of profit relating to the project and all revisions to these calculations made during the course of the project; management reports on actual financial performance as compared to budgets that were prepared during the course of the project; evidence demonstrating that the project proceeded as planned, such as monthly/periodic reports, planned/actual time schedules, interim certificates or account invoices, details of work that was completed but not invoiced by the claimant, details of payments made by the employer and evidence of retention amounts that were recovered by the claimant. In addition, the claimant should provide evidence of the percentage of the works completed at the time work on the project ceased.

4. Loss of profits for future projects

132. Some claimants say they would have earned profits on future projects, not let at the time of Iraq's invasion and occupation of Kuwait. Such claims are of course subject to the sorts of considerations set out by this Panel in its review of claims for lost profits on individual projects. In addition, it is necessary for such a claimant to overcome the problem of remoteness. How can a claimant be certain that it would have won the opportunity to carry out the projects in question? If there was to be competitive tendering, the problem is all the harder. If there was not to be competitive tendering, what is the basis of the assertion that the contract would have come to the claimant?

133. Accordingly, in the view of this Panel, for such a claim to warrant a recommendation, it is necessary to demonstrate by sufficient documentary and other appropriate evidence a history of successful (i.e., profitable) operation, and a state of affairs which warrants the conclusion that the hypothesis that there would have been future profitable contracts is well founded. Among other matters, it will be necessary to establish a picture of the assets that were being employed so that the extent to which those assets would continue to be productive in the future can be determined. Balance sheets for previous years will have to be produced, along with relevant strategy statements or like documents which were in fact utilised in the past. The current strategy statement will also have to be provided. In all cases, this Panel will be looking for contemporaneous documents rather than ones that have been formulated for the purpose of the claim; although the latter may have a useful explanatory or demonstrational role.

134. Such evidence is often difficult to obtain; and accordingly in construction cases such claims will only rarely be successful. And even where there is such evidence, the Panel is likely to be unwilling to extend the projected profitability too far into the future. The political exigencies of work in a troubled part of the world are too great to justify looking many years ahead.

K. Loss of monies left in Iraq

1. Funds in bank accounts in Iraq

135. Numerous claimants seek to recover compensation for funds on deposit in Iraqi banks. Such funds were of course in Iraqi dinars and were subject to exchange controls.

136. The first problem with these claims is that it is often not clear that there will be no opportunity in the future for the claimant to have access to and to use such funds. Indeed, many claimants, in their responses to interrogatories or otherwise have modified their original claims to remove such elements, as a result of obtaining access to such funds after the initial filing of their claim with the Commission.

137. Second, for such a claim to succeed it would be necessary to establish that in the particular case, Iraq would have permitted the exchange of such funds into hard currency for the purposes of export. For this, appropriate evidence of an obligation to this effect on the part of Iraq is required. Furthermore, this Panel notes that the decision to deposit funds in banks located in particular countries is a commercial decision, which a corporation engaged in international operations is required to make. In making this decision, a corporation would normally take into account the relevant country or regional risks involved.

138. This Panel, in analysing the claims presented to it to date concludes that, in most cases, it will be necessary for a claimant to demonstrate (in addition to such matters as loss and quantum) that:

(a) the relevant Iraqi entity was under a contractual or other specific duty to exchange those funds for convertible currencies;

(b) Iraq would have permitted the transfer of the converted funds out of Iraq; and

(c) this exchange and transfer was prevented by Iraq's invasion and occupation of Kuwait.

139. Absent proof of these aspects of the matter, it is difficult to see how the claimant can be said to have suffered any "loss". If there is no loss, this Panel is unable to recommend compensation.

2. Petty cash

140. Exactly the same considerations apply to claims for petty cash left in Iraq in Iraqi dinars. These monies were left in the offices of claimants when they departed from Iraq. The circumstances in which the money was left behind vary somewhat; and the situation which thereafter obtained also varies - some claimants contending that they returned to Iraq but the monies were gone; and others being unable to return to Iraq and establish the position. In these different cases, the principle seems to

this Panel to be the same. Claimants in Iraq needed to have available sums (which could be substantial) to meet liabilities which had to be discharged in cash. These sums necessarily consisted of Iraqi dinars. Accordingly, absent evidence of the same matters as are set out in paragraph 138, supra, it will be difficult to establish a "loss", and in those circumstances, this Panel is unable to recommend compensation.

3. Customs deposits

141. In this Panel's understanding, these sums are paid, nominally at least, as a fee for permission to effect a temporary importation of plant, vehicles or equipment. The recovery of these deposits is dependent on obtaining permission to export the relevant plant, vehicles and equipment.

142. The Panel further understands that such permission was hard to obtain in Iraq prior to Iraq's invasion and occupation of Kuwait. Accordingly, although defined as a temporary exaction, it was often permanent in fact, and no doubt contractors experienced in the subtleties of working in Iraq made suitable allowances. And no doubt they were able to, or expected to, recover these exactions through payment for work done. Once the invasion and occupation of Kuwait had occurred, obtaining s uch permission to export became appreciably harder. Indeed, given the trade embargo, a necessary element would have been the specific approval of the Security Council.

143. In the light of the foregoing, it seems to the Panel that claims to recover these duties need to be supported by sufficient evidentiary material, going to the issue of whether, but for Iraq's invasion and occupation of Kuwait, such permission would, in fact or on a balance of probabilities, have been forthcoming.

144. Absent such evidence and leaving aside any question of double-counting, (see paragraph 123, supra), the Panel is unlikely to be able to make any positive recommendations for compensating unrecovered customs deposits made for plant, vehicles and equipment used at construction projects in Iraq.

L. Tangible property

145. With reference to losses of tangible property located in Iraq, decision 9 provides that where direct losses were suffered as a result of Iraq's invasion and occupation of Kuwait with respect to tangible assets, Iraq is liable for compensation (decision 9, paragraph 12). Typical actions of this kind would have been the expropriation, removal, theft or destruction of particular items of property by Iraqi authorities. Whether the taking of property was lawful or not is not relevant for Iraq's liability if it did not provide for compensation. Decision 9 furthermore provides that in a case where business property had been lost because it had been left unguarded by company personnel departing due to the situation in Iraq and Kuwait, such loss may be considered as resulting directly from Iraq's invasion and occupation (decision 9, paragraph 13).

146. Many of the construction and engineering claims that come before this Panel are for assets that were confiscated by the Iraqi authorities in 1992 or 1993. Here the problem is one of causation. By the time of the event, Iraq's invasion and occupation of Kuwait was over. Liberation was a year or more earlier. Numerous claimants had managed to obtain access to their sites to establish the position that obtained at that stage. In the cases the subject of this paragraph, the assets still existed. However, that initially satisfactory position was then overtaken by a general confiscation of assets by Iraqi authorities. While it sometimes seems to have been the case that this confiscation was triggered by an event which could be directly related to Iraq's invasion and occupation of Kuwait, in the vast majority of the claims that this Panel has seen, this was not the case. It was simply the result of a decision on the part of the authorities to take over these assets. This Panel has difficulty in seeing how these losses were caused by Iraq's invasion and occupation of Kuwait. On the contrary, it appears that they stem from an wholly independent event and accordingly are outside the jurisdiction of the Commission.

M. Payment or relief to others

147. Paragraph 21(b) of decision 7 specifically provides that losses suffered as a result of "the departure of persons from or their inability to leave Iraq or Kuwait" are to be considered the direct result of Iraq's invasion and occupation of Kuwait. Consistent with decision 7, therefore, the Panel finds that evacuation and relief costs incurred in assisting employees in departing from Iraq are compensable to the extent proven.

148. Paragraph 22 of Governing Council decision 7 provides that "payments are available to reimburse payments made or relief provided by corporations or other entities to others - for example, to employees, or to others pursuant to contractual obligations - for losses covered by any of the criteria adopted by the Council".

149. In the Fourth Report, this Panel found that the costs associated with evacuating and repatriating employees between 2 August 1990 and 2 March 1991 are compensable to the extent that such costs are proven by the claimant and are reasonable in the circumstances. Urgent temporary liabilities and extraordinary expenses relating to evacuation and repatriation, including transportation, food and accommodation, are in principle, compensable.

150. Many claimants do not provide a documentary trail detailing to perfection the expenses incurred in caring for their personnel and transporting them (and, in some instances, the employees of other companies who were stranded) out of a theatre of hostilities.

151. In these cases this Panel considers it appropriate to accept a level of documentation consistent with the practical realities of a difficult, uncertain and often hurried situation, taking into account the concerns

necessarily involved. The loss sustained by claimants in these situations is the very essence of the direct loss suffered which is stipulated by Security Council resolution 687 (1991). Accordingly, the Panel uses its best judgement, after considering all relevant reports and the material at its disposal, to arrive at an appropriate recommendation for compensation.